Supreme Court, U.S.
FILED

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No. _____

In The Supreme Court of the United States

IGT A/K/A IGT-NORTH AMERICA,

Petitioner,

v.

COLLINS MUSIC CO., INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Elam v. South Carolina Dep't of Transp.*, the Supreme Court of South Carolina ("South Carolina Supreme Court") granted the South Carolina Department of Transportation's ("South Carolina DOT" or "SCDOT") petition for a writ of certiorari (the "South Carolina DOT Petition") on February 24, 2003. On April 24, 2003, about sixty days later, the South Carolina Supreme Court denied IGT a/k/a IGT-North America's ("IGT") petition for a writ of certiorari (the "IGT State Petition"), which petition raised the same issue as the South Carolina DOT Petition. Therefore, this case presents the following question:

Did the South Carolina Supreme Court deny IGT, an out-of-state corporation, due process of law and equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America when it refused to hold the IGT State Petition after granting the South Carolina DOT Petition, which raised the identical issue?

PARTIES TO THE PROCEEDING BELOW

Collins Music Co., Inc. ("Collins") either changed its name or completed a corporate reorganization while the case was pending. The entity that appeared at trial was Collins Entertainment Corporation. IGT changed its name to IGT-North America at one point in its corporate history. IGT has since changed its name back to IGT.

CORPORATE DISCLOSURE STATEMENT

IGT, a Nevada corporation, is a wholly-owned subsidiary of International Game Technology. International Game Technology, also a Nevada corporation, is a publicly traded corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
1. SOUTH CAROLINA ERROR-PRESERVATION RULES REQUIRE LITIGANTS TO FILE RULE 59(e) MOTIONS WHEN A TRIAL COURT HAS NOT EXPLICITLY RULED ON AN ISSUE	3
2. THE IGT STATE PETITION AND THE SOUTH CAROLINA DOT PETITION INVOLVE THE SAME ISSUE	3
3. IGT'S FIRST CHANCE TO RAISE ITS FEDERAL CLAIM WAS IN THIS PETITION	10
REASONS FOR GRANTING THE WRIT	12
1. THE COURT SHOULD SETTLE AN IMPORTANT, UNRESOLVED QUESTION THAT COULD AFFECT THE MORE THAN 59,000 LITIGANTS WHO PETITION STATE COURTS OF LAST RESORT EACH YEAR FOR DISCRETIONARY REVIEW	12

TABLE OF CONTENTS – Continued

Page

2. THE SOUTH CAROLINA SUPREME COURT ERRED IN REFUSING TO HOLD *IGT* FOR *ELAM* 17

A. DUE PROCESS AND EQUAL PROTECTION APPLY TO STATE JUDICIAL ACTION 18

B. FEDERAL DUE PROCESS AND EQUAL PROTECTION SHOULD REQUIRE A STATE COURT OF LAST RESORT TO HOLD A PETITION FOR DISCRETIONARY REVIEW AFTER THE COURT HAS GRANTED DISCRETIONARY REVIEW IN ANOTHER CASE THAT INVOLVES THE IDENTICAL ISSUE, IF RESOLUTION OF THE FIRST CASE REASONABLY COULD CONTROL THE OUTCOME OF THE SECOND CASE AND THE SECOND LITIGANT CALLS THESE FACTS TO THE COURT'S ATTENTION ... 20

C. THE IGT STATE PETITION AND THE SOUTH CAROLINA DOT PETITION INVOLVE THE SAME ISSUE 23

D. IGT CALLED THE NEED FOR A HOLD TO THE ATTENTION OF THE SOUTH CAROLINA SUPREME COURT 25

CONCLUSION 26

INDEX TO APPENDIX ..... App. (i)

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930) 11, 18

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) 14, 22

Evitts v. Lucey, 469 U.S. 387 (1985) 18, 19

Griffin v. Illinois, 351 U.S. 12 (1956) 18

Griffith v. Kentucky, 479 U.S. 314 (1987) 14

Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993) 14

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) 18, 22

I'On, L.L.C. v. Town of Mt. Pleasant, 526 S.E.2d 716 (S.C. 2000) 3

Louis v. Supreme Court of Nevada, 490 F. Supp. 1174 (D. Nev. 1980) 18, 22, 23

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 19

Nike, Inc. v. Kasky, 539 U.S. —, 123 S.Ct. 2254 (2003) 21

Noisette v. Ismail, 403 S.E.2d 122 (S.C. 1991) 3

Payton v. Kearse, 460 S.E.2d 220 (S.C. Ct. App. 1995) *rev'd on other grounds*, 495 S.E.2d 205 (S.C. 1998) 3

Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) 11

Saunders v. Shaw, 244 U.S. 317 (1917) 11, 12

State ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313 (1930) 11

TABLE OF AUTHORITIES – Continued

Page

Straight v. Wainwright, 476 U.S. 1132 (1986) 14, 15, 16, 17, 23

TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993) 22

Van Blarcum v. City of North Myrtle Beach, 523 S.E.2d 486 (S.C. Ct. App. 1999) 3

Waldon v. District Court, 130 N.W.2d 728 (Iowa 1964) 19

Walker v. Bluff Apartments, 477 S.E.2d 472 (S.C. Ct. App. 1996) 3

Watson v. Butler, 483 U.S. 1037 (1987) 14, 15, 16, 17

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

U.S. Const. amend. XIV, § 1 ..... 1, 2

28 U.S.C. § 1257 1

S.C. Code Ann. § 14-3-330 19

S.C. Code Ann. § 18-9-10 19

Rule 14 10

MISCELLANEOUS

A. Hellman, *Case Selection in the Burger Court: A Preliminary Review*, 60 Notre Dame L. Rev. 947 (1985) 13

TABLE OF AUTHORITIES – Continued

Page

B. Ostrom, N. Kauder & R. LaFountain, *Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project* (National Center for State Courts 2003) (available at www.ncsconline.ord/D_Research/csp/2002_Files/2002_Maine_Page.html) 13

Hon. J. Toal, et al., *Appellate Practice in South Carolina* (1999) 3

M. Arkin, *Speedy Criminal Appeal: A Right Without a Remedy*, 74 Minn. L. Rev. 437 (1990) 19

R. Revesz & P. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. Pa. L. Rev. 1067 (1988).....15, 16, 20, 21

J. Tussman & J. tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949).....14

PETITION FOR WRIT OF CERTIORARI

Petitioner IGT respectfully petitions for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

OPINIONS AND ORDERS BELOW

The order of the South Carolina Supreme Court denying discretionary review in this case is not reported. *See* App. at 1-2. The opinion of the South Carolina Court of Appeals dismissing IGT's appeal is reported at 353 S.C. 559 and 579 S.E.2d 524. *See* App. at 3-12.

JURISDICTION

On April 24, 2003, the South Carolina Supreme Court entered an order (the "Order") denying the IGT State Petition. Justice Toal, the Chief Justice of that court, would have granted certiorari. IGT seeks review of the Order on the ground that the Order denied IGT due process of law and equal protection of the laws in violation of the Fourteenth Amendment. *See infra* pp. 17-26. The Court, therefore, has jurisdiction to review the Order pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

After the South Carolina Court of Appeals dismissed IGT's appeal, IGT filed the IGT State Petition. The IGT State Petition asked the South Carolina Supreme Court to determine whether a Rule 59(e) motion, the filing of which in the trial court was necessary to preserve errors for judicial review under South Carolina's error-preservation jurisprudence, stayed the time for filing a notice of appeal to the South Carolina Court of Appeals. The South Carolina Supreme Court denied the IGT State Petition even though it had already granted the South Carolina DOT Petition, which raised the identical issue.

Accordingly, the question presented in this petition is whether federal due process and equal protection required the South Carolina Supreme Court to hold the IGT State Petition *after* it granted the South Carolina DOT Petition, which presented the exact same issue. The answer to this unresolved question has significance not only to the more than 59,000 litigants who seek discretionary review every year in a state court of last resort, but also to the 43 state

courts of last resort that enjoy some amount of discretionary jurisdiction.

1. SOUTH CAROLINA ERROR-PRESERVATION RULES REQUIRE LITIGANTS TO FILE RULE 59(e) MOTIONS WHEN A TRIAL COURT HAS NOT EXPLICITLY RULED ON AN ISSUE.

The South Carolina courts have consistently held that a litigant must make a Rule 59(e) motion in the trial court to preserve an error for appellate review where the trial court does not explicitly rule on an issue. *See, e.g., I'On, L.L.C. v. Town of Mt. Pleasant*, 526 S.E.2d 716, 724-25 (S.C. 2000); *Payton v. Kearse*, 460 S.E.2d 220, 227-28 (S.C. Ct. App. 1995), *rev'd on other grounds*, 495 S.E.2d 205 (S.C. 1998). Implicit or inconsistent rulings do not preserve errors for review. *See* Hon. J. Toal, et al., *Appellate Practice in South Carolina* 59 (1999); *Van Blarcum v. City of North Myrtle Beach*, 523 S.E.2d 486, 490 (S.C. Ct. App. 1999) (refusing to address issue on appeal because "[n]owhere" did lower court "explicitly treat the *precise* issue") (emphasis added); *see also Noisette v. Ismail*, 403 S.E.2d 122, 123 (S.C. 1991) (accord); *Walker v. Bluff Apartments*, 477 S.E.2d 472, 474 (S.C. Ct. App. 1996) (accord).

2. THE IGT STATE PETITION AND THE SOUTH CAROLINA DOT PETITION INVOLVE THE SAME ISSUE.

In 1994, Collins, a South Carolina corporation, brought this breach of contract and tort action against IGT, a Nevada corporation. After a nine-day trial, a jury returned a $15 million verdict in favor of Collins. IGT

promptly moved for judgment notwithstanding the verdict ("JNOV"), a new trial, and a new trial *nisi remittitur* pursuant to South Carolina Rules of Civil Procedure ("SCRCP") 50(b) and 59(a). The motions asserted 28 separate grounds of error.

The trial court denied IGT's post-trial motions in a one-page order that was too non-specific to preserve the 28 grounds of error for appellate review. The trial court did not explicitly address each ground, and its reasoning made it clear that it did not consider every assignment of error. For example, the trial court denied IGT's motion for a new trial, stating that it addressed *all* issues correctly at trial. *See* App. at 79. This reasoning demonstrates that the trial court neither considered nor ruled on the "thirteenth juror" doctrine because IGT, for obvious reasons, could not have moved *at trial* for a *new trial* on the ground that the jury's verdict was so excessive as to indicate caprice, passion or prejudice.[1]

In addition, the trial court's reasons for denying IGT's post-trial motions were inconsistent with its rulings at trial. For example, IGT moved *in limine* to prevent Collins from contradicting factual positions it had previously taken before the trial court and other courts. Judicial estoppel was also one of the bases for IGT's motion for a directed verdict. The court denied both IGT's motion *in limine* and its motion for a directed verdict, ruling that judicial estoppel was inapplicable as a matter of law. Thus, the trial court appeared to change course when it denied

[1] The "thirteenth juror" doctrine is similar to a request for a new trial because the verdict is "against the weight of the evidence."

IGT's motion for JNOV because there was "sufficient *evidence* to sustain the jury's verdict." *See* App. at 79 (emphasis added).

Faced with an order containing implicit and inconsistent rulings, IGT moved under Rule 59(e) for an order altering or amending the judgment solely for the purpose of preserving each of the 28 grounds of error for judicial review.[2] The trial court denied IGT's Rule 59(e) motion, concluding that "Defendant's Motion raises no issues that were not already considered by the Court in denying Defendant's post[-]trial motions."[3] App. at 209. IGT appealed.

Collins moved to dismiss IGT's appeal as untimely, relying on *Quality Trailer Prods. Inc. v. CSL Equip. Co.*, 562 S.E.2d 615 (S.C. 2002), a case decided after IGT filed its Rule 59(e) motion and subsequent notice of appeal. Collins argued that IGT's Rule 59(e) motion did not stay the time for filing a notice of appeal because it "merely" repeated the grounds for IGT's JNOV and new trial motions. IGT had filed a notice of appeal within 30 days of the trial court's order that denied its Rule 59(e) motion, but

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[2] The motion provides:

> The Defendant requests that the Court make *specific rulings, and [provide] the basis therefore, as to each ground raised* in Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial and New Trial Remittitur filed August 13, 2001 with the Clerk of Court for Horry County.

See App. at 23 (emphasis added).

[3] Similar to the trial court's order in *Elam*, this order "altered" the judgment (for error-preservation purposes) by making clear for the first time that the trial court had considered and ruled on *each* of the 28 grounds of error on which IGT intended to seek judicial review.

more than 30 days after the trial court denied IGT's first post-trial motion. Relying on the *Quality Trailer Products* decision, the South Carolina Court of Appeals concluded that IGT's motion was a "successive" one that did not toll the time for filing a notice of appeal and dismissed IGT's appeal on September 4, 2002.

IGT filed a petition for rehearing and rehearing *en banc*, but the South Carolina Court of Appeals did not act upon the petition.[4] Instead, it asked the South Carolina Supreme Court to accept certification of the case for two reasons. First, it noted that it could not "convene a quorum to consider the en banc request." *See* App. at 93. Second, it pointed to the "significance of the issues in South Carolina trial and appellate procedural law." *Id.*

On November 15, 2002, apparently recognizing that the case involved "important" issues of "trial and appellate" procedure, the South Carolina Supreme Court accepted certification of the case and took jurisdiction for "all purposes." *See* App. at 90; South Carolina R. App. P. 204(b). Then on January 10, 2003, the South Carolina Supreme Court reversed course. The South Carolina Supreme Court issued an order in which it "regarded" the "petition for rehearing *en banc*" denied, and invited IGT to seek certiorari review. App. at 91. Accordingly, IGT filed a petition for writ of certiorari on February 7, 2003.

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[4] The South Carolina Court of Appeals could not act on the petition for rehearing *en banc* because 4 of 9 judges recused themselves. It likewise could not act on the petition for rehearing because one member of the three-judge panel had recused himself.

The IGT State Petition was grounded on the conflict between South Carolina decisions holding that a trial judge's implicit ruling on issues in a post-trial order does not preserve those issues for appellate review, and the South Carolina Court of Appeals' holding in *IGT*. *See* App. at 95-119. The core question raised in the IGT State Petition is whether the South Carolina Court of Appeals properly applied the *Quality Trailer Products* decision to a situation where the trial court's order contained implicit and inconsistent rulings. *See, e.g.*, App. at 104-112. Meanwhile, on February 24, 2003, the South Carolina Supreme Court granted the South Carolina DOT Petition in the *Elam* case. In its reply, IGT raised the need for a hold by noting the "significance of the issues raised in [the IGT State Petition] can also be seen by this Court's grant of certiorari" in *Elam* which "presents similar issues" concerning the scope of the *Quality Trailer Products* decision. *See* App. 141. Yet, on April 24, 2003, the South Carolina Supreme Court denied the IGT State Petition.

Elam involves an action against the South Carolina DOT for personal injuries and property damage that Hattie Elam sustained in a single-car automobile accident. After the jury returned a verdict in favor of Elam, the South Carolina DOT moved for JNOV, a new trial and a new trial *nisi remittitur*. The trial court denied the motions, ruling from the bench. The South Carolina DOT filed a Rule 59(e) motion to alter or amend the judgment. SCDOT, like IGT, filed a notice of appeal within 30 days of the trial court's order denying its Rule 59(e) motion, but more than 30 days after the trial court's order denying its motions for JNOV, new trial and new trial *nisi remittitur*.

The South Carolina Court of Appeals dismissed SCDOT's appeal. Relying on the *Quality Trailer Products*

decision, the South Carolina Court of Appeals concluded that SCDOT's Rule 59(e) motion did not stay the running of the time for filing a notice of appeal, just as it did in *Collins Music Co. v. IGT*. *Compare* App. at 143-49 *with* 3-12. The South Carolina Court of Appeals denied SCDOT's petition for rehearing on September 18, 2002, just two weeks after it dismissed IGT's appeal.

The South Carolina DOT filed a petition for writ of certiorari on October 18, 2002, arguing that the case warranted review, in part, because the South Carolina Court of Appeals' "efforts to apply the holding [of the *Quality Trailer Products* decision] *in at least two cases* have brought a dramatic and troublesome change to post-trial practice in South Carolina."[6] App. at 162 (emphasis added). The core issue presented in the South Carolina DOT petition was whether the Court of Appeals properly extended the *Quality Trailer Products* decision to cases

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[6] The relevant *Elam* facts, for error-preservation purposes, are virtually identical to *IGT*. SCDOT defended the case on several grounds. One ground was that it did not have notice of the problem that allegedly caused Ms. Elam to lose control of her car on March 8, 1998. SCDOT had repaired a problem at the same location on February 10, 1998. Relying on the decision of the South Carolina Supreme Court in *Summer v. Carpenter*, 492 S.E.2d 55 (S.C. 1997), SCDOT asserted that "a governmental entity must be on notice that the problem is continuing for liability to be imposed after remedial measures have been taken." When the trial court denied SCDOT's first post-trial motion, it did not explicitly state the basis for its ruling.

Similar to the trial court's ruling in *IGT*, the trial court's ruling in *Elam* could have been based on one of two grounds. The trial court could have denied the motion based either on its view of the facts (*i.e.*, because the evidence supported a finding that SCDOT received notice after it completed repairs on February 10, 1998) or its view of the law (*i.e.*, South Carolina law did not require SCDOT to receive notice after it completed repairs on February 10, 1998).

where the trial court order contained implicit and inconsistent rulings.[6] *See* App. at 182-83 ("The Court of Appeals' application of *Quality Trailer Products* has extended that holding so that the need for discerning which issues have been explicitly ruled upon and which issues have not, poses a nearly impossible conundrum for trial lawyers.").

In its reply filed November 22, 2002, just one week after the South Carolina Supreme Court had accepted jurisdiction over *IGT* for the apparent purpose of deciding "significant" issues of "South Carolina trial and appellate procedural law," the South Carolina DOT urged the South Carolina Supreme Court to grant review in *Elam* because:

> This Court has now accepted review of another case (*Collins Music Co., Inc. v. IGT*) involving a number of the same issues in this case, with factual differences regarding the presentation of

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[6] Specifically, in its reply, SCDOT argued:

> It should now be evident that the simple statement from *Quality Trailer Products*, cited by the Court of Appeals, that "where the appellant's Rule 59(e) motion merely reiterated, with a few procedural alterations, the grounds previously raised and ruled on in its prior motion for JNOV and new trial, its Rule 59(e) motion amounted to a successive motion for JNOV and new trial and did not toll the time for serving notice of appeal" is not susceptible of ready application without further elucidation from this Court. It is of the utmost importance to litigants and counsel as well, that the holding of *Quality Trailer Products* be placed in context with the kinds of issues raised in this case, involving implicit rulings, internal inconsistencies, and the apparent conflict between the need for a sufficient ruling for [error-preservation] versus the timeliness of filing a notice of appeal.

App. at 203.

> post-trial motions. Petitioner respectfully urges this Court to grant certiorari and consider both cases in consolidation, so that all issues raised may be raised comprehensively and a clarifying ruling may be issued.

App. at 203. Thus, even the South Carolina DOT recognized that the IGT State Petition and the SCDOT Petition raised identical issues and, for that reason, should be consolidated.

3. IGT'S FIRST CHANCE TO RAISE ITS FEDERAL CLAIM WAS IN THIS PETITION.

IGT did not "press" its federal claim to the South Carolina Supreme Court, and that court did not "pass" on the question presented in this petition. *See* Rule 14(g)(i). As we explain below, this fact should not prevent the Court from addressing the question in this petition. Indeed, the due process and equal protection issues are not likely to be framed any better than they are in this case. Substantively, the *Elam* and *IGT* cases involve the identical issue. Procedurally, it is unlikely that a body of lower-court case law whose analysis may aid this Court will develop, inasmuch as most denials of certiorari are rendered without an opinion.

Generally, a federal question must have been raised in the state courts for it to be properly before this Court. But so long as the federal issue on which review is sought is raised at the earliest opportunity, neither the failure to present the federal issue to the state court nor the state court's failure to resolve the federal issue precludes the Court from hearing the question. This case falls within that exception to the rule because the question on which IGT seeks review arose from the unanticipated act of the

state supreme court in treating similarly situated litigants differently. *See State ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930) (addressing federal question where litigant could not anticipate state court decision and raised federal issue at first opportunity); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917) (accord). Where the ruling of a state court could not have been anticipated, the federal claim is timely so long as it is presented at the first opportunity for raising it. *See Gehner*, 281 U.S. at 320; *Saunders*, 244 U.S. at 320; *see also Pruneyard Shopping Ctr. v. Robins,* 447 U.S. 74, 85-86 n.9 (1980) ("[T]his Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation."); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-78 (1930) (holding that a claim arising from unanticipated decision of Missouri Supreme Court was timely when raised at first opportunity).

Here, IGT filed its petition for certiorari with the South Carolina Supreme Court on February 7, 2003. On February 24, 2003, the South Carolina Supreme Court granted the South Carolina DOT Petition in *Elam*, a case involving the identical issue presented in the IGT State Petition. Accordingly, at the first opportunity, IGT advised the South Carolina Supreme Court of the need for a hold, noting that the "significance of the issues raised" in its petition was evidenced by the state supreme court's grant of certiorari in *Elam*, and reminding the South Carolina Supreme Court that the issues presented in the two cases were the same. After the South Carolina Supreme Court had granted review in *Elam* on the very same issue that IGT had raised, IGT could not have anticipated that the

South Carolina Supreme Court would deny the IGT State Petition outright, instead of hold it or grant it and consolidate the case with *Elam*.

Because the South Carolina Supreme Court does not accept petitions for rehearing from a denial of certiorari, IGT could not challenge the unanticipated action of that court after its unexpected decision to deny the IGT State Petition outright. Accordingly, the present petition before this Court represents the first available opportunity for IGT to raise the federal claims raised herein. When the act giving rise to a petitioner's federal claim is an unexpected act of a state supreme court, done when the party no longer has a right to add to the record or seek rehearing of a decision, "it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come" to this Court for review. *Saunders*, 244 U.S. at 320.

REASONS FOR GRANTING THE WRIT

1. THE COURT SHOULD SETTLE AN IMPORTANT, UNRESOLVED QUESTION THAT COULD AFFECT THE MORE THAN 59,000 LITIGANTS WHO PETITION STATE COURTS OF LAST RESORT EACH YEAR FOR DISCRETIONARY REVIEW.

This case involves an important federal question that has not been, but should be, settled by this Court. The question is whether federal due process and equal protection set a constitutional floor that compels a state court of last resort, which exercises some element of discretionary jurisdiction, to "hold" a case raising a particular issue once

the court has exercised its discretion and granted a request for plenary consideration of the identical issue in another case. This Court should resolve this important question for three reasons. First, the question is widespread, arising in possibly thousands of cases each year. Second, the question involves the pillar upon which the common law and American constitutional systems are built; namely, that like cases be treated alike. Adherence to this pillar not only ensures the institutional integrity of our legal system, but also provides the consistency and predictability needed for social and economic stability. Third, this Court's decisions provide insufficient guidance on this question for state courts of last resort.

The sheer number of appeals filed in state courts of last resort and the regularity of this Court's hold practice suggest the question's prevalence. Forty-three state courts of last resort enjoy some amount of discretion in selecting cases that receive plenary review. *See* B. Ostrom, N. Kauder & R. LaFountain, *Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project*, 71 (National Center for State Courts 2003). In 2001, "there were 276,408 cases filed in" state appellate courts. *Id.* at 70. Approximately 87,550 (32 percent) of those filings were discretionary appeals. *See id.* at 72. Of those discretionary appeals, some 59,675 (68 percent) were filed with state courts of last resort. *Id.* During the first four terms of the 1980's, this Court held more than 500 cases for plenary decisions in other cases. A. Hellman, *Case Selection in the Burger Court: A Preliminary Review*, 60 Notre Dame L. Rev. 947, 969 (1985).

Not only does the question potentially affect thousands of cases, but the nature of the question further establishes the need for a definitive answer. The Court's

hold policy is grounded on the deep-rooted "conviction that like cases must be treated alike." *Straight v. Wainwright*, 476 U.S. 1132, 1135 (1986) (Brennan, J., dissenting). The "conviction" reflects "those first principles of justice that ultimately define a system of law: the principles of uniform application of rules, of consistency, of evenhandedness, of fairness." *Id.* This conviction also reflects the "reasonable classification" doctrine that animates the Court's equal protection jurisprudence. "The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated." J. Tussman & J. tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 344 (1949) (footnote omitted); *see Griffith v. Kentucky* 479 U.S. 314, 322-23 (1987) (concluding that failure to apply a new constitutional rule to all "similarly situated" criminal defendants, *i.e.*, those whose cases were pending on direct review, violates "basic norms of constitutional adjudication"); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (noting equal protection is "essentially a direction that all persons similarly situated should be treated alike").

Those principles apply with full force to all cases, *see Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 90 (1993) (concluding that Court's application of a rule of federal law to litigants before the Court in a civil case requires retroactive application to all cases still open on direct review), not just the few capital cases in which the Court has discussed them. *See Straight*, 476 U.S. 1132; *Watson v. Butler*, 483 U.S. 1037 (1987). Crucially, these are the principles that provide the predictability and stability

necessary for our judicial system to maintain its institutional integrity.

Yet, despite the apparent significance of the question, the Court's decisions provide insufficient direction to state courts of last resort about the need to develop hold policies. The Court plainly recognizes an obligation, "following the grant of certiorari in one case, to hold certiorari petitions raising the same issue that are filed prior to the announcement of a decision on the merits." R. Revesz & P. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. Pa. L. Rev. 1067, 1118 (1988) (hereinafter "*Nonmajority Rules*"). However, the jurisprudential genesis of the Court's hold policy is not adequately developed. *See id.* at 1120 ("The question of why the obligation on the Supreme Court to 'treat like cases alike' arises at the time of the grant of certiorari to decide a particular issue does not have an obvious answer."). Thus, the question remains: Precisely how does the ancient common law concern for treating "like cases alike," which might be termed "judicial equal protection," translate into the Fourteenth Amendment's requirements of "due process of law" and "the equal protection of the laws"?

The Court's statements in *Straight* and *Watson* implicate, but do not fully resolve, that important question. Both cases involved applications for a stay of execution filed by prisoners sentenced to death. In both cases, four Justices had voted to hold petitions for a writ of certiorari filed by each of the prisoners. At issue was whether the Court should issue a stay of execution pending resolution of the cases for which Straight's and Watson's petitions for writ of certiorari had been held.

Justice Brennan's dissenting opinions in *Straight* and *Watson* resonate with the sound of constitutional equality. In *Straight*, Justice Brennan, joined by Justices Marshall and Blackmun, grounded the obligation to hold a case on the principles of consistency, evenhandedness, fairness and uniformity. *Straight*, 476 U.S. at 1135. In *Watson*, Justice Brennan, again joined by Justices Marshall and Blackmun, made express the hold policy's footing. The "prospect" that two litigants, who they believed presented "exactly the same claim," would receive disparate treatment was "the ultimate derogation of the Court's duty to provide *equal justice under law*." *Watson*, 483 U.S. at 1039 (emphasis added).

Justice Powell's explanation of the hold rule in *Straight* is equally important. Justice Powell wrote an opinion, in which then Chief Justice Burger, current Chief Justice Rehnquist, and Justice O'Connor joined, concurring in the denial of the stay. Justice Powell's explanations of the hold rule and his reason for voting to deny the stay only serve to buttress the conclusion that equality concerns drive the hold policy.

First, Justice Powell explained that the Court often holds cases so as not to "tip [its] hand" before announcing an opinion in the potentially controlling case. *Straight*, 476 U.S. at 1132 n.2. But this rationale for the hold rule simply underscores the policy's equality justification. *See Nonmajority Rules* at 1115 ("It is only if subsequent cases should be affected by prior grants that a decision not to hold a petition indicates anything with regard to the outcome of the granted case."). Second, Justice Powell's explanation of his vote further supports the notion of judicial equal protection. In his view, "no matter how *Darden*," the lead case, was resolved, Straight's claim

failed because of a procedural bar. *Straight*, 476 U.S. at 1132 n.2. Justice Powell, in other words, based his vote on his view that the two litigants were not similarly situated. *Id.* Once again, Justice Powell's reasoning necessarily implies that the Court is obligated to "treat like cases alike"; he simply concluded that Straight and Darden were not similarly situated.

So, is a state court of last resort compelled under the Fourteenth Amendment to "treat like cases alike" by developing a hold policy? While logic and the Justices' discussion in *Straight* and *Watson* suggest that the answer is yes, the Court's jurisprudence does not provide definitive guidance on the issue. Seizing the unique opportunity furnished by this case to decide this purely legal question will provide state courts of last resort the guidance necessary to develop hold policies that comply with federal due process and equal protection requirements. In addition, resolving the question will minimize the potential for disparate treatment of similarly situated litigants and ensure due process of, and equal protection under, the law.

2. THE SOUTH CAROLINA SUPREME COURT ERRED IN REFUSING TO HOLD *IGT* FOR *ELAM*.

While the South Carolina Supreme Court enjoys broad discretion in selecting the cases that it will review, once it determined in *Elam* that a certain issue warranted review, it could not deny a subsequent petition raising the identical issue. As explained below, federal due process and equal protection principles, which constrain state judicial action, should require the South Carolina Supreme Court to hold the IGT State Petition pending *Elam* because (a) the *Elam* decision likely could control the

outcome of the *IGT* case, and (b) IGT called the need for a hold to the South Carolina Supreme Court's attention.

A. DUE PROCESS AND EQUAL PROTECTION APPLY TO STATE JUDICIAL ACTION.

Due process and equal protection apply to state judicial action. "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government." *Brinkerhoff-Faris Trust & Sav. Co.*, 281 U.S. at 680. Likewise, the federal guaranty of equal protection also reaches state judicial action. *See Louis v. Supreme Court of Nevada*, 490 F. Supp. 1174 (D. Nev. 1980) (holding that complaint, which alleged that state supreme court arbitrarily and unequally exercised discretion to allow some applicants to sit for bar exam, stated claim for relief). This Court "has not hesitated" to declare proceedings "violative of due process" when "absent procedures would have provided protection against arbitrary and inaccurate adjudication." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (striking down Oregon statute eliminating judicial review of punitive damage awards).

Where a state provides an unsuccessful litigant an appeal as of right, the appellate process must accord with the basic requirements of due process. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) ("[I]f a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' . . . the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.") (quoting *Griffin v. Illinois*,

351 U.S. 12, 18 (1956)). Implicit in this conclusion is the idea that the creation of an appellate system necessarily "alter[s] the balance between the layers of adjudication in a constitutionally significant manner." M. Arkin, *Speedy Criminal Appeal: A Right Without a Remedy*, 74 Minn. L. Rev. 437, 459 (1990). The introduction of a second tier of adjudication, in other words, unavoidably affects the operation and significance of the first tier.

For this reason, due process and equal protection place constraints on the appellate process even though due process does not require an appeal in the first place. Once created, an appeal as of right forms an integral and inextricable part of the procedures for determining whether a defendant will be deprived of life, liberty, or property. *Evitts*, 469 U.S. at 403-04. Consequently, having created a right of appellate access, *see* S.C. Code Ann. §§ 14-3-330(1) & 18-9-10, South Carolina cannot dole out appellate justice in an arbitrary, irrational or unequal manner. *See M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (striking down a state's appellate access regime on a combination of due process and equal protection grounds); *see also Waldon v. District Court*, 130 N.W.2d 728, 731 (Iowa 1964) (holding that a statute conferring right to appeal on state, but denying the same right to prisoners, violated federal equal protection).

B. FEDERAL DUE PROCESS AND EQUAL PROTECTION SHOULD REQUIRE A STATE COURT OF LAST RESORT TO HOLD A PETITION FOR DISCRETIONARY REVIEW AFTER THE COURT HAS GRANTED DISCRETIONARY REVIEW IN ANOTHER CASE THAT INVOLVES THE IDENTICAL ISSUE, IF RESOLUTION OF THE FIRST CASE REASONABLY COULD CONTROL THE OUTCOME OF THE SECOND CASE AND THE SECOND LITIGANT CALLS THESE FACTS TO THE COURT'S ATTENTION.

It is important to recognize at the outset the precision of the standard that IGT advocates. Neither due process nor equal protection required the South Carolina Supreme Court to *grant* the IGT State Petition simply because that court granted discretionary review on the same issue in the *Elam* case. Due process and equal protection, however, do compel the South Carolina Supreme Court to *hold* the IGT State Petition pending a decision in *Elam* once the South Carolina Court has *already* granted plenary review on the same issue in *Elam*, and IGT apprised the South Carolina Supreme Court of the need for a hold. The critical facts, of course, are the chronology of the decisions and that *Elam* and *IGT* are sufficiently analogous so that a reversal in *Elam* would compel re-examination of *IGT*.

"It is beyond dispute that no obligation to treat like cases alike [for purposes of deciding which case will receive plenary, discretionary review] attaches before the grant of certiorari on a particular issue." *Nonmajority Rules* at 1118. The South Carolina Supreme Court certainly could deny certiorari on Monday in a case involving a particular issue, only to grant certiorari in a case that

raises the same issue four days later on Friday. *See id.* at 1118-19 ("Similarly, it is perfectly consistent with the Court's exercise of its discretionary jurisdiction to deny certiorari in a case raising a particular issue and, a short time later, to grant certiorari in another case raising the same issue and decided the same way by the lower courts."). What at first glance appears, at least from the litigant's perspective, to be inconsistent treatment is simply a product of discretionary review.

For any number of reasons, the second case might be considered "certworthy" while the first was not. A split of authority might have developed after the court denied certiorari in the first case, but before it faced the question again in the second case. Moreover, the procedural posture of the first case might make it an unlikely vehicle for issuing an authoritative opinion resolving an important question. *See, e.g.*, *Nike, Inc. v. Kasky*, 539 U.S. —, 123 S.Ct. 2254, 2259 (2003) (Stevens, concurring) (noting that correct resolution of novel and important question is "more likely to result from the study of a full factual record than from a review of mere unproven allegations in a pleading"). In addition, the "lawyering" in the second case might make it a better vehicle for resolving a given issue.

It is only when the South Carolina Supreme Court decided to review the South Carolina DOT Petition in *Elam* that the obligation to "treat like cases alike" was triggered. At that point, the South Carolina Supreme Court was compelled to hold the IGT State Petition, which presented the very same issue. The refusal to hold the IGT State Petition gives new meaning to the old notion of the "race to the courthouse." It arbitrarily and irrationally provides the fastest litigant (the South Carolina DOT) with the opportunity to obtain the benefit of plenary

review.[7] Such arbitrary and irrational judicial decisions can violate federal due process and equal protection.[8]

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[7] This fact, that the South Carolina DOT could receive the benefit of the *Elam* decision, while IGT, an out-of-state corporation, would not, is particularly suspect. *See City of Cleburne*, 473 U.S. at 453 n.6 (Court must be especially vigilant in evaluating rationality of classification involving traditionally disfavored group); *Honda Motor Co.*, 512 U.S. at 432 (broad discretion given to juries when imposing punitive damage awards "creates the potential that juries will use their verdicts to express biases against big business, particularly those without a strong local presence"); *see also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (plurality) (noting risk that punitive damages award may be "influenced by prejudice against large corporations," and emphasizing that risk is "of special concern when the defendant is . . . a nonresident"); *id.* at 493 (O'Connor, J., dissenting) ("temptation to transfer wealth from out-of-state corporate defendants to in-state plaintiffs can be quite strong" in cases involving claim for punitive damages).

[8] *See Louis*, 490 F. Supp. at 1183-84. *Louis* involved an action brought under 42 U.S.C. § 1983 by an attorney, who had been licensed to practice law in California for thirty-six years, against the Supreme Court of Nevada, the five individual justices of that court, the Nevada State Bar Association, and the Board of Bar Examiners. *Id.* at 1177. Ms. Louis sought a judgment "ordering the defendants to permit her to take the 1980 Nevada bar examination, money damages and attorney fees." *Id.* She claimed that the Nevada Supreme Court's practice of arbitrarily, capriciously and unequally waiving, for some applicants, the requirement that an applicant have graduated from an A.B.A accredited law school effected "the denial of like treatment to the plaintiff and others" in violation of equal protection and due process. *Id.*

Ms. Louis alleged that a number of "male graduates of unaccredited law schools" were permitted to sit for the Nevada bar examination. *Id.* Between 1976 and 1978, nine men and no women applied for waivers. Seven waivers were granted, and two were denied. In 1979, seven men and two women applied for waivers. Only one man received a waiver in 1979. "On the other hand, late applications to take the bar examination were made by six women in 1976 and by four women in 1978." *Id.* All ten applications were granted.

The court held that this allegation stated a claim for relief under the due process and equal protection clauses. "Where waivers of a rule

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Simply put, the decision rejected "those first principles of justice that ultimately define a system of law: the principles of uniform application of rules, of consistency, of evenhandedness, of fairness." *Straight*, 476 U.S. at 1134. Thus, the South Carolina Supreme Court betrayed the common law tenet that like cases must be treated alike by fishing one case involving South Carolina from the stream of appellate review.

C. THE IGT STATE PETITION AND THE SOUTH CAROLINA DOT PETITION INVOLVE THE SAME ISSUE.

The South Carolina DOT Petition and the IGT State Petition raised the same basic issue: Did the South Carolina Court of Appeals err in holding that a Rule 59(e) motion does not toll the time for appeal where the trial court's order denying the petitioner's JNOV motion could have been based on either of two independent grounds, and well established precedent required the filing of a Rule 59(e) motion to preserve both grounds for appeal?

The two cases are factually indistinguishable for error-preservation purposes. IGT and SCDOT both filed motions for JNOV, new trial, and new trial *nisi remittitur* after the jury returned an adverse verdict. The trial court, in an oral ruling in *Elam* and a written order in *IGT*,

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are not granted with consistency and no explanation is given for the disparity of treatment, a finding of a denial of equal protection may be appropriate." *Id.* at 1183. While that rule alone "would suffice to keep the plaintiff in court," the court reasoned that, if the defendant's actions "promoted no legitimate state interest and were without a rational basis," the actions would violate due process and equal protection. *See id.* at 1184.

denied the motions in both cases. In both cases, the trial court's ruling did not explicitly address an argument that the unsuccessful litigant wanted to preserve for judicial review.

In the *Elam* case, the trial court could have denied South Carolina DOT's post-trial motions either on the basis of its view of the facts (*i.e.*, because the evidence supported a finding that SCDOT received notice after it completed repairs on February 10, 1998) or its view of the law (*i.e.*, South Carolina law did not require SCDOT to receive notice after it completed repairs on February 10, 1998). App. at 174. In denying the post-trial motions, the trial court did not explicitly "rule on" both grounds. Similarly, in *IGT* the reason the trial court gave for denying IGT's motion for a new trial made it clear that the trial court had not ruled on the IGT's "thirteenth juror" argument. *See supra* at p. 4. Because implicit rulings do not preserve errors for appellate review, both SCDOT and IGT had to move to alter or amend the judgment to preserve errors for judicial review. The two cases are identical for error-preservation purposes.[9]

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[9] Collins could argue that the cases differ in two respects and, therefore, a reversal in *Elam* would not control the outcome in *IGT*. First, Collins might assert that the *Elam* case differs because the trial court's oral ruling on the first set of post-trial motions altered a ruling that the court made at trial. *See* App. at 180-81. There is, however, no distinction here. The trial court's order on IGT's motion for a new trial and JNOV also altered rulings at trial. For instance, IGT moved for a directed verdict on the ground that Collins was judicially estopped from taking factual positions that contradicted positions Collins previously took in this and other prior litigation. The trial court specifically denied the motion on a legal basis, ruling that the doctrine of judicial estoppel did not apply because Collins' previous testimony amounted to a "legal

(Continued on following page)

D. IGT CALLED THE NEED FOR A HOLD TO THE ATTENTION OF THE SOUTH CAROLINA SUPREME COURT.

In its reply in support of the IGT State Petition, IGT advised the South Carolina Supreme Court of the need for a hold. IGT explained that both cases involved the exact same issue and, for that reason, the South Carolina Supreme Court's "grant of certiorari in" the *Elam* case demonstrated the "significance of the issues" raised in the IGT State Petition. In addition, the South Carolina DOT had previously asked the South Carolina Supreme Court to consolidate the two cases. Thus, the South Carolina Supreme Court was aware of the need to hold *IGT* for a decision in *Elam*.

The Constitution's concern for fairness and equality does not require a state court of last resort to "be on the lookout for" related cases. But the facts here, that a state court of last resort has granted review on an issue in one

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position" instead of a factual one. Thus, the trial court likewise altered its trial ruling when it rejected IGT's 50(b) motion because there was "sufficient evidence" to sustain the jury verdict.

Second, Collins might argue that *Elam* and *IGT* are distinguishable because the trial judge responded favorably to SCDOT's Rule 59(e) motion by issuing a detailed ruling. But this argument fares no better. In *Elam*, the trial court altered, or clarified, its ruling by providing a detailed explanation of its reasons for denying the JNOV and new trial motions. *See* App. at 180-81. In *IGT*, the trial court also altered, or clarified, its ruling for error-preservation purposes, by making express the fact that it ruled on *all* issues presented by IGT. App. at 209 ("Defendant's Motion raises no issues that were not already considered by the Court in denying Defendant's post trial motions."). This distinction, the eloquence of the trial judge's response to a proper request for clarification, is without any meaningful difference.

case and a litigant in a second case advised the court that the case involves the identical issue, should trigger the safeguards of "due process of the law" and "equal protection under the laws." If the tenet that like cases be treated alike has constitutional substance, it means that once a litigant apprises the state court of last resort of the need for a hold, that state court may not simply ignore the potential for disparate treatment.

CONCLUSION

The petition should be granted so that the Court can resolve this important question of first impression.

Respectfully submitted,

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INDEX TO APPENDIX

Supreme Court of South Carolina Order denying IGT's petition for writ of certiorari (April 24, 2003) ..... App. 1

South Carolina Court of Appeals Order dismissing appeal (September 4, 2002) ..... App. 3

IGT's Petition for Rehearing, Rehearing En Banc, and Alternatively for Reinstatement, and Certification (September 19, 2002) ..... App. 13

South Carolina Court of Appeals Order denying petition rehearing (May 13, 2003) ..... App. 86

South Carolina Court of Appeals request to certify appeal to the Supreme Court of South Carolina (October 23, 2002) ..... App. 88

Supreme Court of South Carolina Order certifying the appeal (November 15, 2002) ..... App. 90

Supreme Court of South Carolina Order deeming petition for rehearing en banc denied (January 10, 2003) ..... App. 91

Correspondence from South Carolina Court of Appeals regarding recusal of Judge Goolsby (January 27, 2003) ..... App. 93

IGT's Petition to the Supreme Court of South Carolina for a Writ of Certiorari (February 7, 2003) ..... App. 95

Collins Music Co. Inc.'s Return to Petition for Writ of Certiorari (March 7, 2003) ..... App. 120

IGT's Reply to Collins' Return (March 12, 2003) ... App. 137

South Carolina Court of Appeals order dismissing appeal in *Elam v. South Carolina Dep't of Transportation* (July 25, 2002) ..... App. 143

INDEX TO APPENDIX – Continued

South Carolina Department of Transportation's Petition for Rehearing in *Elam v. South Carolina Dep't of Transportation* (August 8, 2002).....App. 150

South Carolina Court of Appeals order denying rehearing in *Elam v. South Carolina Dep't of Transportation* (September 18, 2002).....App. 165

South Carolina Department of Transportation's Petition for a Writ of Certiorari in *Elam v. South Carolina Dep't of Transportation* (October 18, 2002).....App. 166

Elam's Return to Petition for a Writ of Certiorari in *Elam v. South Carolina Dep't of Transportation* (November 15, 2002).....App. 185

South Carolina Department of Transportation's Reply to Return *Elam v. South Carolina Dep't of Transportation* (November 22, 2002).....App. 202

Supreme Court of South Carolina's Order granting petition for writ of certiorari in *Elam v. South Carolina Dep't of Transportation* (February 24, 2003).....App. 208

South Carolina Court of Common Pleas Order denying IGT's Rule 59(e) motion (October 29, 2001).....App. 209

IGT's Return Opposing Respondent's Motion to Dismiss (May 30, 2002).....App. 210

South Carolina Rule of Appellate Procedure 201.....App. 233

South Carolina Rule of Appellate Procedure 204.....App. 233

[LOGO]

The Supreme Court of South Carolina

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April 24, 2003

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Re: Collins Music v. IGT
1994-CP-26-03266

Dear Counsel:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari Denied.

s/ James E. Moore J.
For the Court

James F. Flanagan, Esquire
R. Wayne Byrd, Esquire
Wilson S. Sheldon, Esquire
R. Heath Atkinson, Esquire
Ronald E. Boston, Esquire
Page Two
April 24, 2003

"I would grant Certiorari.

s/ Jean H. Toal C.J.

April 24, 2003."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

/s/ Daniel E. Shearouse
CLERK

DES/dmh

cc: George M. Hearn, Jr., Esquire
James B. Van Osdell, Esquire
Cynthia Graham Howe, Esquire
James R. Gilreath, Esquire
Scott Michael Mongillo, Esquire
The Honorable Jeanne J. Roberts
The Honorable Kenneth A. Richstad

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Collins Music Co., Inc., Respondent,

v.

IGT a/k/a IGT-North America, Appellant.

Appeal From Horry County
John L. Breeden, Circuit Court Judge

APPEAL DISMISSED

Ronald E. Boston, of Columbia, and R. Wayne Byrd, of Florence, for appellant.

George M. Hearn, Jr., of Conway; James B. Van Osdell and Cynthia Graham Howe, both of Myrtle Beach; James R. Gilreath, of Greenville; and Scott M. Mongillo, of Mt. Pleasant for respondent.

PER CURIAM: Collins Music Company ("Collins Music") brought suit against IGT a/k/a/ IGT-North America ("IGT") in the circuit court. A jury awarded a fifteen million dollar judgment to Collins Music. IGT appeals the trial court's denial of its motions for judgment notwithstanding the verdict ("JNOV"), new trial, and new trial *nisi remittitur.* We dismiss the appeal as untimely.

FACTS/PROCEDURAL BACKGROUND

Collins Music filed suit against IGT asserting numerous causes of action arising out of a contract dispute. The parties had previously entered into a video machine distributorship agreement. A jury found in favor of Collins Music and awarded it a judgment of fifteen million dollars in actual damages.

On August 13, 2001, IGT timely filed and served post-trial motions pursuant to Rules 50(b) and 59, SCRCP. Specifically, IGT moved for JNOV, new trial, and alternatively, new trial *nisi remittitur*. IGT delineated twenty-eight grounds as support for its request for relief. The circuit court judge issued a written order denying all of IGT's post-trial motions, "[a]fter carefully reviewing the matter." IGT was served with a copy of this order on September 5, 2001.

Seven days later, on September 12, 2001, IGT served a Rule 59(e) motion to alter or amend the judgment. In the motion, IGT merely restated the arguments it made in the material filed with its first post-trial motions and requested the circuit judge to "make specific rulings, and the basis therefore [sic], as to each ground raised" in the earlier motions. On October 29, 2001, the circuit judge issued a written order denying the Rule 59(e) motion and specifically stating IGT failed to raise any issue not already considered. IGT received written notice of entry of the order on November 5, 2001. IGT served its notice of appeal on November 21, 2001.

ISSUE

Did IGT's second motion toll the time for serving an appeal?

LAW/ANALYSIS

Rule 203(b)(1), SCACR provides that a notice of appeal from a judgment of the Court of Common Pleas

> shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

IGT moved for relief under Rules 50(b) and 59 within ten days of the verdict, which the circuit judge denied. Following the circuit judge's denial, IGT filed and served a Rule 59(e) motion to alter or amend the judgment. The circuit judge denied this motion.

Collins Music argues this Court lacks subject matter jurisdiction because IGT's notice of appeal was not timely served. Collins Music contends IGT's Rule 59(e) motion did not toll the time for appeal because the Rule 59(e) motion was nothing but a restatement of the arguments IGT made in its initial post-trial motions.

A. Coward Hund Construction Company v. Ball Corporation

In *Coward Hund Construction Company v. Ball Corporation,* 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), this Court addressed successive Rule 59(e) motions and the tolling of the time for appeal.

Coward Hund sued Ball and Carolina Glass, alleging claims for negligence, breach of express and implied warranties, and breach of contract. Coward Hund additionally sought indemnification arising from allegedly defective building repairs. The defendants moved for summary judgment.

The court granted summary judgment to both defendants on all of Coward Hund's claims. Coward Hund filed a motion for reconsideration, which was denied.

Thereafter, Coward Hund filed a second motion for reconsideration "seek[ing] clarification of the issue raised before the trial court on two occasions regarding Plaintiff's indemnity claim against Defendants." *Id.* at 2, 518 S.E.2d at 57. In response, the circuit court issued a supplemental order stating: "[T]he court granted summary judgment to Defendants Carolina Glass and Ball Corp. without the court referencing any prejudice regarding Coward Hund's indemnity claims, if any." *Id.* Coward Hund served its notice of appeal within thirty days of receiving written notice of the order denying the second motion for reconsideration but more than thirty days after receiving written notice of the order denying the first motion for reconsideration.

This Court concluded:

> "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" *Arnold v. State,* 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting *Budinich v. Becton Dickinson and Co.,* 486 U.S. 196, 200, 108 S.Ct. 1717, 100 L. Ed.2d 178 (1988)). As one authority has noted, "Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised." James F. Flanagan, *South Carolina Civil Procedure* 475 (2d ed. 1996).

Id. at 4, 518 S.E.2d at 58.

The *Coward Hund* decision emphasized that a successive Rule 59(e), SCRCP motion, following the denial of a similar motion, did not toll the time for appeal, where the court's ruling on the first such motion did not change or alter its ruling at trial. This Court held: "[A] second motion for reconsideration is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration." *Id.* at 3, 518 S.E.2d at 58.

B. Quality Trailer Products v. CSL Equipment Company

Our supreme court recently addressed the issue of whether a successive motion captioned as a Rule 59(e) motion to alter or amend tolls the time for appeal in *Quality Trailer Products, Inc. v. CSL Equipment Company,* 349 S.C. 216, 562 S.E.2d 615 (2002).

Quality Trailer Products ("Quality Trailer") brought suit against CSL Equipment Company ("CSL") and I Corp. Quality Trailer sought recovery against I Corp. for breach of the former Bulk Transfers Act, promissory estoppel, and successor liability. The circuit court granted I Corp.'s motion for directed verdict on Quality Trailer's statutory claim and submitted the remaining theories to the jury. The jury awarded judgment to Quality Trailer.

I Corp. made a timely motion for JNOV and new trial. By written order filed December 21, 1999, this motion was denied. I Corp. filed a subsequent post-trial motion captioned as a motion to "Alter, Amend or Reconsider Judgment and Findings Denying Defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial." *Id.* at 218, 562 S.E.2d at 616. The caption of this motion indicated it was made pursuant to Rules 52, 59, and 60. In actuality, this motion was almost a duplicate of the first motion for relief. The only alterations I Corp. made to the subsequent motion were to caption the motion differently and to change the relief sought to coincide with the second motion's caption. The circuit court recognized this successive motion was virtually identical to the first post-trial motion and denied the second motion by order dated February 16, 2000. I Corp. appealed on March 17, 2000, almost three months after the circuit judge's denial of I Corp.'s first post-trial motion for relief.

In analyzing the timeliness of appeal, the court held:

> We agree with the rationale of *Coward Hund* and hold that **successive** new trial motions or motions for JNOV do not toll the time for serving notice of appeal. **The time for filing appeal is not extended by submitting the same motion under a different caption.** *See Mickle v.*

> *Blackmon,* 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (treating motion based on its "substance and effect" rather than how it is captioned by movant). *See also Sears v. Sears,* 85 Ill.2d 253, 52 Ill.Dec. 608, 422 N.E.2d 610 (1981) (a successive motion that was little more than a slightly lengthened redraft of the first motion was improper and did not extend the time for filing appeal); *Boughton v. McAllister,* 576 N.W.2d 94 (Iowa 1998) (a party should not be allowed to extend the time for appeal indefinitely by filing successive motions that address the same issue).

Id. at 220-21, 562 S.E.2d at 617-18 (second emphasis added) (footnote omitted).

I Corp. argued on appeal that the second post-trial motion was required to preserve issues presented but not ruled upon in the trial court's order denying the motions for JNOV and new trial. Our supreme court disagreed stating:

> The second motion did not . . . identify a single issue raised but not ruled upon – it merely recites, verbatim, the arguments made in the earlier motions. **The trial court's denial of the JNOV and new trial motions was a ruling on all issues raised, and preserved for appellate review all issues raised therein.**

Id. at 221, 562 S.E.2d at 618 (emphasis added).

C. Applicability of Coward Hund and Quality Trailer

Coward Hund and *Quality Trailer* clearly stand for the proposition that although a successive post-trial motion for relief is permissible, the subsequent motion

must seek relief on issues coming to light as a result of an order following an initial post-trial motion that **alters or amends** the judgment. The successive motion cannot be a motion to alter or amend that merely recites arguments in a previous Rule 59(e) motion, as was the case in *Coward Hund,* or the recaptioning of a previous Rule 50 or Rule 52 motion as a Rule 59(e) motion, as was done in *Quality Trailer.*

Here, IGT requested JNOV, a new trial, and alternatively, a new trial *nisi remittitur* in its first post-trial motions. IGT premised its motions upon twenty-eight separate grounds. The circuit court denied these motions. The court made no alterations or amendments to the judgment. At that point, all issues regarding JNOV, new trial, and new trial *nisi remittitur* were resolved by the circuit judge and were ripe for appellate review. The time for IGT to serve its notice of appeal began to run following its receipt of written notice of the judge's denial order. Nevertheless IGT filed a subsequent Rule 59(e) motion, seeking an order altering or amending the post-trial order to more specifically address each of the twenty-eight separate grounds.

The circuit judge, however, was not required to provide a detailed analysis respecting each of the twenty-eight grounds offered in support of JNOV, new trial, and new trial *nisi remittitur.* The requirement imposed upon the court by Rule 52(a), SCRCP to "find the facts specially and state separately its conclusions of law" is limited to cases tried without a jury or with an advisory jury and is inapplicable here. *See, e.g.,* Rule 52(a), SCRCP ("In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law . . . . Findings of fact

and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."); *see also Folkens v. Hunt,* 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) ("We have . . . refused to require trial judges to explain reasons for ruling on [the request for a new trial as the thirteenth juror]."); *Bailey v. Segars,* 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001) (stating a form order denying a motion for JNOV and new trial coupled with the transcript of the proceedings was sufficient to allow appellate review and a Rule 59(e) motion was not required to preserve issues for appeal), *cert. granted on other grounds* (Jan. 10, 2002); *Armstrong v. Union Carbide,* 308 S.C. 235, 417 S.E.2d 597 (Ct. App. 1992) (stating that while order of the circuit court did not separately list and specifically address each of the twenty-nine exceptions raised, it was clear from reviewing the order that all grounds raised below were considered).

Additionally, IGT supported its Rule 59(e) motion not with arguments based upon the circuit judge's order, but by repeating verbatim the twenty-eight grounds found in the first motion and referencing analysis found in the first motion's memorandum of law. IGT failed to identify in its Rule 59(e) motion any issue raised but not ruled upon. The circuit judge recognized the Rule 59(e) motion as a request to revisit the grounds and arguments made in the earlier motions, and denied the motion.

IGT's second post-trial motion was not an appropriate Rule 59(e) motion; instead it was simply a successive motion for JNOV and new trial. For the reasons set forth in *Coward Hund* and *Quality Trailer,* the second post-trial motion did not toll the time for serving the notice of appeal.

CONCLUSION

The circuit judge denied IGT's motions for JNOV, new trial and new trial *nisi remittitur* in his first post-trial order. Accordingly, the underlying issues giving rise to these motions were preserved and ripe for appellate review.

We rule IGT's Rule 59(e) motion was nothing but a recapitulation of the arguments raised and previously ruled upon by the circuit court and did not toll the time for serving the notice of appeal. We therefore dismiss the appeal as untimely.

APPEAL DISMISSED.

GOOLSBY, CONNOR, ANDERSON, JJ., concur.

Filed 9-4-02

THE STATE OF SOUTH CAROLINA

In The Court Of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

John L. Breeden, Jr., Circuit Court Judge

Case No. 94-CP-26-3266

Collins Music Co., Inc., Respondent,

v.

IGT a/k/a IGT-North America, Appellant.

PETITION FOR REHEARING AND REHEARING *EN BANC*, AND ALTERNATIVELY FOR REINSTATEMENT, AND CERTIFICATION

Appellant, IGT a/k/a IGT-North America ("IGT"), respectfully petitions the Court, pursuant to Rules 221(a) and 219, SCACR, for a rehearing, requesting a rehearing *En Banc*, of Respondent, Collins Music Co.'s ("Collins"), Motion to Dismiss the Appeal. In the alternative, IGT petitions the Court, pursuant to Rules 221(a) and 204(b), SCACR, to withdraw its Order, to reinstate IGT's appeal, and to certify this case to the Supreme Court for review because it involves legal principles of major importance to the bench, bar and litigants.

SUMMARY OF POINTS MISAPPREHENDED OR OVERLOOKED

1. The holding at best creates substantial ambiguity in the case law governing error preservation, and at worst is inconsistent with existing error preservation

precedent from this Court and the Supreme Court. (Petition I., A.)

2. Tolling of the time to appeal is controlled by Rules 59(f), 203(b)(1), and existing case law, and is unrelated to the requirements of Rule 52(a). (Petition I., A.)

3. The qualifying language in the trial court's order clearly raised questions about the existence and sufficiency of its ruling on all grounds IGT advanced in its post-trial motions, thus warranting a 59(e) motion and application of the tolling provision. (Petition I., A. and B.)

4. The trial court's wording in the order raised reasonable doubt and uncertainty to IGT and its attorneys as to whether all issues were ruled on with sufficient explicitness to preserve error for appeal. (Petition I., B.)

5. Holding that the word "denied" in post-trial motions following a jury trial prevents application of the tolling provision for a subsequently filed 59(e) motion, virtually eliminates 59(e) motions in jury trials. (Petition I., B.)

6. The holding referred to in 4 above also opens the door for jurisdictional challenges in numerous appeals now pending in the Appellate Courts and in *all* future appeals from cases where 59(e) motions are now pending. (Petition I., B.)

7. This Court misconstrues *Quality Trailer* and misapplies its holding to the facts in this case. (Petition I., C.)

8. Tying the tolling provision of Rules 203(b)(1) and 59(f) to an after-the-fact determination of the "appropriateness" of a 59(e) motion is without precedent, imposes substantial injustice contrary to the Rule 1, SCRCP, and ignores the same federal precedent upon which our Courts have previously relied. (Petition II., A.)

9. The holding referenced in 8 above, being without precedent, inflicting substantial injustice contrary to our court rules, and ignoring federal court precedent, effectively denies IGT's right to equal protection and due process under the Constitutions of this state and of the United States.

I. THE COURT MISAPPREHENDED THE EFFECT OF THE QUALIFICATIONS CONTAINED IN THE TRIAL JUDGE'S ORDER.

This appeal presents issues of overriding importance to the South Carolina bar. This Court, by treating IGT's Rule 59(e), SCRCP motion the same as its previous motions for JNOV and new trial, misapprehended the purpose of the 59(e) motion, overlooking that IGT specifically sought rulings on all issues in order to preserve them for appeal. Moreover, the Court created confusion and a conflict in the law regarding the preservation of error and the tolling provision of Rules 203(b)(1), SCACR and 59(f), SCRCP.

A. ERROR PRESERVATION IS ABSOLUTELY REQUIRED FOR ISSUES ON APPEAL.

Case law in South Carolina is replete with admonitions from its Courts that, above all other appellate practice rules, preservation of issues for appeal is paramount. In *Kennedy v. The S.C. Retirement System*, S.C. Sup. Ct. Order dated July 23, 2001 (Shearhouse Adv. Sh. No. 27) the Supreme Court stated, "We reiterate this Court's longstanding principle of error preservation. 'Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plain error rule.'" (Quoting

Hon. Jean H. Toal, et al., *Appellate Practice in South Carolina* 65 (1999)).

In dozens of cases, the Courts have refused to hear issues not properly ruled on by the trial judge. (See *I'On L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000); *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *Pelican Bldg. Ctrs. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993); *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991); *Shealy v. Aiken Co.*, 341 S.C. 448, 535 S.E.2d 438 (1991); *Trivelas v. S.C. D.O.T.*, 348 S.C. 124, 558 S.E.2d 271 (Ct. App. 2001); *Vespazianni v. McAlister*, 301 S.C. 411, 415 S.E.2d 427 (Ct. App. 1992) et al).

In *Noisette*, *id.*, a case cited in over thirty-five error preservation decisions, the Supreme Court held that a trial judge must "explicitly" rule on *any* issue that a party intends to appeal. If the judge does not, a party must make a 59(e) motion requesting an explicit ruling, or the issue will not be preserved for appeal. This Court now holds that *Noisette* and the cases citing it have no applicability in jury cases, stating that Rule 52(a), SCRCP only requires specific findings of fact and law in *non*-jury cases. This Court misapprehends and overlooks the Supreme Court's explicit holding in *Noisette* that error preservation requirement is premised on case law *interpreting 59(e)*, and is totally unrelated to Rule 52(a).

Furthermore, Rule 52(a) *specifically* excludes its application to orders addressing summary judgment ("findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 . . .", Rule 52(a), SCRCP). Despite this language, the Supreme Court and this Court have repeatedly *refused to address* implicitly ruled upon issues in summary judgment motions

where a 59(e) motion was not filed. (See *Summer v. Carpenter*, *id.*; *Trivelas v. S.C. D.O.T.*, *id.)* Also, in *Walker v. The Bluffs Apartments*, 324 S.C. 350, 477 S.E.2d 472 (Ct. App. 1995), one of the appellant's grounds raised to the trial judge on motion for summary judgment was the common knowledge exception to the need for expert testimony. The judge found the expert's affidavit insufficient and granted summary judgment without specifically ruling on the "common knowledge" issue. On appeal, this Court refused to hear the issue stating:

> We need not address this argument because **it is not properly before the court**. The record shows that Walker argued the common knowledge exception to Narmour's motion for summary judgment. The trial court ruled that Walker's expert was not qualified, but **did not explicitly rule** on Walker's argument for application of the common knowledge exception.

By failing to even *mention* Rule 52(a) in *Walker*, this Court clearly recognizes that the "explicit" ruling requirement in case law interpreting Rule 59(e) is entirely unrelated to and independent of Rule 52(a) requirements.

Even more applicable to the particular situation here is *Payton v. Kearse*, 319 S.C. 188, 460 S.E.2d 233 (Ct. App. 1995) (rev. on other grounds), a **jury trial**, where this Court refused to hear an issue not properly addressed by the trial court, and not preserved by a 59(e) motion. This Court held that although the issue on appeal (new trial based upon juror disqualification) was *clearly* raised to the trial judge, and the judge *clearly* denied the relief sought (new trial), the *issue* was not preserved because the order failed to specifically address it, and no 59(e) motion was made. As with the above cited cases, this holding is totally

independent of Rule 52(a) and is based *only* on case law interpreting Rule 59(e) (citing *Noisette*, *id.*).

Of the cases IGT *had* for guidance, every single one held that unclear or inexplicit rulings of the trial court not preserved for review would not be considered.[1] Under these cases, IGT's motion was properly made.

B. THE TRIAL JUDGE'S ORDER REASONABLY RAISED DOUBTS AS TO WHETHER ALL ISSUES HAD BEEN PROPERLY RULED ON.

In the decision dismissing IGT's appeal, this Court determined that the trial judge's order definitively denied IGT's JNOV/new trial motions by using the word "denied;" however, the Court misapprehends and overlooks the doubt and uncertainty raised by the wording in the rest of the order. The Court's decision here leads members of the bar to believe that the word "denied" appearing in an order is now sufficient to preserve all error. Presumably, the word "granted" would have like impact. This holding at best creates a substantial ambiguity in the case law on error preservation. At worst, the holding is inconsistent with existing case law and requires those cases to be overruled. The holding also opens the door for jurisdictional challenges to appeals now pending in this Court and

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[1] Although *Coward Hund Const. Co. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), was decided two years prior to this trial, it held only that successive 59(e) motions do not toll the time for appeal. As IGT's first motion was clearly not a 59(e) motion, the second motion could not have been a "successive" 59(e) motion; thus *Coward Hund* has no applicability here.

the Supreme Court, as well as to currently pending 59(e) motions in jury trials.

IGT's motions for JNOV, new trial, and new trial *nisi additur* were supported by a seventeen-page memorandum of law discussing twenty-eight separate *issues* for the trial judge to consider. (Exhibits "A" and "B"). In response, the trial judge issued a one-page order, drafted by attorneys for Collins, which did not simply deny all motions; rather, it contained several qualifications casting doubt as to whether the judge had ruled on all issues. (Exhibit "C"). Again, the cases IGT had for guidence held that unclear and inexplicit rulings not preserved would not be considered.

For instance, IGT moved for new trial based upon the thirteenth juror doctrine in grounds 25 and 26 of its JNOV/new trial motion. In his order, the judge denied the new trial motions because, "all issues [were] properly addressed at trial." As the motion based on the thirteenth juror doctrine was made *after* trial, the judge's wording obviously exhibits that he had not considered that issue, or *at least* questions whether he had. IGT's subsequent 59(e) motion asked the judge to "specifically rule" on the issues and grounds raised in the JNOV/new trial motion, *which included* the thirteenth juror grounds.

Similarly, IGT's motion for JNOV included a request (ground 20) for the judge to rule "as a matter of law that Collins' claimed damages were barred by public policy." In the order, the judge denied IGT's JNOV motions because there was "sufficient evidence to sustain the jury's verdict." This made no sense, and IGT certainly could not conclude that the judge had ruled, much less sufficiently ruled, on this important legal issue. IGT requested a

specific *ruling* on this issue as well by including it as one of the twenty-eight grounds listed in its 59(e) motion.[2] (Exhibit "D").

At trial and in its initial post-trial motion for JNOV, IGT also raised several issues of law which required a ruling solely by the *judge*. They were not issues for the jury's consideration.[3] The wording of the order denying the JNOV motion clearly altered the judge's stated "legal" basis for his rulings at trial to a "sufficiency of evidence" basis in the order.[4] In addition to requesting a *ruling* on the issues and grounds, IGT's motion also asked the judge to "state the basis" for each of those grounds. Without making this request, IGT risked having these crucial issues not preserved for review by this Court.[5]

The trial judge did not simply deny IGT's motions as the Court holds. Rather, he qualified his denial. The effect of these qualifications made it unclear to IGT whether the judge ruled on all issues and whether he changed the basis

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[2] The order also failed to even mention the motions based upon IGT's counterclaims, to which at least twenty of the twenty-eight grounds pertained.

[3] See grounds 24, 28, 16, 15, 18, and 14 for JNOV.

[4] For example, IGT moved to bar Collins' damages under collateral estoppel because Collins had pled and recovered the same damages in a previous action (ground 16). The judge denied this motion on a legal basis, holding that collateral estoppel did not apply because IGT was not a party to the previous action. However, in the order, the judge stated that JNOV was denied because there was "sufficient evidence to sustain the jury's verdict."

[5] The fact that IGT's 59(e) motion included some of the 28 grounds that might *have* been ruled on is only surplusage. Their inclusion does not affect the significance of grounds included which clearly had *not* been addressed.

for his rulings from those at trial. To preserve error, IGT filed a 59(e) motion asking the judge to make "specific *rulings* and the basis therefore [sic]" as to each of the twenty-eight grounds raised in IGT's JNOV/new trial motion. This request was made *solely* for error preservation, and was consistent with the existing admonitions of this Court and the Supreme Court.

C. *QUALITY TRAILER* IS NOT APPLICABLE TO THIS CASE.

Quality Trailer holds *only* that successive motions for new trial or JNOV do not toll the time for filing a notice of appeal. Therefore, it is only applicable to this case if IGT's *second* motion was also a JNOV/new trial motion. This Court held that IGT's second post-trial motion *was*, like the second post-trial motion in *Quality Trailer*, a "successive motion for JNOV and new trial." However, in making this analogy, the Court overlooked that the Supreme Court characterized the second motion in *Quality Trailer* by the ***relief*** it sought, while this Court characterized IGT's second motion only by the ***grounds*** *supporting* the relief. A contrast of the relief sought in *both* motions reveals that IGT's 59(e) was not a successive JNOV/new trial motion.

1. *Quality Trailer* requested the identical relief in both post-trial motions.

A motion, however styled, is "to be [construed as] the type proper for the *relief* requested." *Demeres v. Roncor, Inc.*, 1992 U.S. App. LEXIS 14984 (9th Cir. 1992). (emphasis added.) Our Supreme Court has also recognized that a motion is properly construed based upon its "substance

and effect." *Mickle v. Blackmon*, 255 S.C. 136, 177 S.E.2d 548 (1970).

In *Quality Trailer*, contrary to appellant I. Corp.'s claim on appeal that its 59(e) motion was made for error preservation, the Supreme Court noted that the relief sought by I. Corp. in its second post-trial motion was exactly the *same relief* sought in its first motion. The Court was correct. The motion was *not* made for error preservation, it was made to ask for JNOV/new trial for a second time. In fact, "error preservation" as the second motion's basis was only raised *after* this Court held that "reconsideration" was not a proper basis for making a 59(e) motion.[6] I. Corp.'s mistake was evident from a review of its motions. In its JNOV motion, I. Corp. asked for the following:

> . . .[I. Corp] **respectfully prays to have the jury verdict and judgment of $86,314.53 in favor of Plaintiff, set aside and to have judgment entered in accordance with I. Corp's Motion** for Directed Verdict **and in support thereof states**: . . . (emphasis added.)

In its second motion, although captioned under 59(e), I. Corp. prayed for the *exact relief* sought in its initial motion. In fact, the second motion was an almost word-for-word duplicate of the first. There, I. Corp asked:

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[6] As evidence of further confusion, this holding is not consistent with a case cited in the order dismissing IGT's appeal, *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). There, the Supreme Court held, "**the purpose** of Rule 59(e), SCRCP, to alter or amend the judgment, is to request the trial judge **to reconsider** matters properly encompassed in a decision on the merits." (emphasis added).

> . . . [I.Corp] **respectfully prays to have the jury verdict and judgment of $86,314.53 in favor of Plaintiff, set aside and to have judgment entered ir accordance with I. Corp's Motion** for Judgment Notwithstanding the Verdict and with I. Corp's Motion for Directed Verdict or in the alternative prays for a new trial in accordance with I. Corp's Motion for New trial **and in support thereof states**: . . . (emphasis added.)

2. IGT's second motion was not identical to its first motion

In contrast to I. Corp., IGT did not seek the same relief twice. IGT's initial post-trial motion for JNOV, new trial, and new trial *nisi remittitur*, requested the following *relief*:

> . . . IGT hereby moves the Court . . . for an Order granting IGT: (a) a judgment in favor of IGT notwithstanding the verdict [for Collins' causes of action] . . . (b) in the alternative a new trial absolute or remittitur to all causes of action of Collins, (c) a judgment in favor of IGT notwithstanding the verdict [on IGT's counterclaims] . . . (d) in the alternative, for a new trial absolute with regard to all of the causes of action set forth in IGT's Counterclaims.

Unlike *Quality Trailer*, the relief sought in IGT's JNOV/new motion is entirely different than the relief sought in its 59(e) motion. In its 59(e) motion, IGT requested the following:

> The Defendant requests that the Court make *specific rulings*, and the basis therefore [sic], as to each ground raised in Defendant's Motion for

> Judgment Notwithstanding the Verdict, New Trial and New Trial Remittitur filed August 13, 2001 with the Clerk of Court for Horry County. (emphasis added).

While nearly *every word* of I. Corp's requests in its motions for JNOV and 59(e) were identical, *not one word* of IGT's requests in its initial motions mirrored its 59(e) motion. Clearly, the motions filed by IGT were not even similar, much less identical, to the corresponding motions in *Quality Trailer*. In addition, this Court's observation that IGT filed a 59(e) motion asking the judge "to more specifically address each of the twenty-eight separate grounds" is not accurate. IGT only asked the judge to "make specific *rulings* and the *basis*" for its ruling, "as to each ground." In other words, IGT only asked the judge to *rule* on the issues, not to rehash previous rulings. Therefore, IGT's second motion was not a successive motion for JNOV and new trial, and *Quality Trailer* has no application here.[7]

II. THE COURT'S ORDER CREATES AN IMPROPER STANDARD FOR THE TOLLING PROVISION OF RULE 203(b)(1).

The last sentence of Rule 1, SCRCP, states that the rules are to be construed to achieve just determinations. This statement is consistent with the Rule 8(f), which provides that pleadings should be construed to "do substantial justice." In fashioning a decision that, for the first

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[7] Furthermore, it is important to note that the events surrounding IGT's 59(e) motion occurred six months *before Quality Trailer* was even decided.

time, ties the effect of the tolling provision in Rule 203(b)(1) to an after-the-fact determination of the "appropriateness" of a Rule 59(e) motion, this Court has not adhered to these principles. Rather, the Court's holding imposes a substantial *injustice* not only to IGT, but to numerous other litigants who currently have jury verdicts on appeal or pending post-trial motions. There is no precedent in South Carolina for this interpretation. Moreover, it may open the floodgate for challenges to pending and final appeals in this Court, as well as pending appeals in the Supreme Court, on the ground that the Courts lack subject matter jurisdiction.

A. FEDERAL PRECEDENT IS TOTALLY CONTRARY TO THIS DECISION.

The holdings in *Coward Hund* and *Quality Trailer* are limited to situations where a party files successive JNOV or 59(e) motions. In adopting these holdings, the Court in *Coward Hund* looked solely to federal precedent. (citing *Brown v. United Ins. Co. of Am.*, 807 F.2d 1239 (5th Cir. 1987)). Likewise, in reviewing the standard for "proper" motions for tolling purposes only, this Court should also consider federal precedent.

For purposes of tolling the time for appeal, federal courts view motions which even *arguably* could be 59(e) motions as proper. In *Forrest v. Occidental Petroleum Corp.*, 1990 U.S. App. LEXIS 19292 (9th Cir.), the court stated, "We have previously liberally interpreted motions for reconsideration as having been filed pursuant to Rule 59(e) in determining whether the time for filing a notice of appeal from the underlying judgment or order has run . . . 'Even if a motion [to alter or amend] is inartfully drawn or so defective that it could not properly be granted, **it is still**

enough to toll the time for appeal.' (quoting *Sierra-On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415 (9th Cir. 1984). (emphasis added.)

Instead of summarily dismissing a party's appeal because it does not view the 59(e) motion as "proper" or "appropriate", federal courts interpret the standard of review for 59(e) motions separately – one standard when addressing the merits of the motion, and a less-strict standard when addressing the tolling effect of the motion. In *Forrest*, *id.*, the court stated, "In cases addressing the time for appeal, we have generally found a motion for reconsideration to be within Rule 59(e) if it requests a substantive change in the judgment, *regardless of the grounds upon which it is raised* . . . [Even if a 59(e) motion] raises no new grounds but 'simply rehashes arguments heard at trial', [it] may be made under Rule 59(e)." (quoting *Clipper Express v. Rocky Mountain Motor Tarriff*, 690 F.2d 1240 (9th Cir. 1982)). The court further explained that, "On the other hand, when reviewing the merits of an order granting or denying a 59(e) motion, we apply a stricter standard." *Forrest* at 17.

Numerous federal cases follow the same principle. In *Cloud v. Summers*, 110 F.3d 67 (9th Cir. 1997), the court held, "As we have ruled, if a motion served within ten days of judgment *could* have been brought under Rule 59(e), the motion tolls the time for appeal even if Rule 59 is not expressly invoked." (emphasis added.)

As the basis for dismissal in *Coward Hund* was federal law, this Court should look to and apply the federal courts' interpretation of 59(e) motions for tolling purposes. Federal courts recognize no judicious purpose in dismissing an appeal for filing a 59(e) motion that at least has

arguable merits. This principle should be especially applicable where every single case decided at the time a 59(e) motion was filed held that such motions are not only good practice, but are *required* to preserve issues for appeal.

B. A MOTION TO ALTER OR AMEND, EVEN IF SUBSEQUENTLY DETERMINED TO BE UNNECESSARY, IS STILL A 59(e) MOTION.

As addressed above, IGT had a reasonable basis to question the sufficiency of the trial judge's order addressing IGT's JNOV and new trial motions. After reviewing the existing error preservation case law, IGT decided to file a 59(e) motion in order to unquestionably preserve its issues for appeal. In response, this Court made a hindsight substitution of its judgment for IGT's on whether a 59(e) motion was necessary and "appropriate." Furthermore, the Court held that because a 59(e) motion was not appropriate, it did not toll the time for appeal. This holding is incorrect, unfair, and should be reconsidered.

Although this Court apparently disagrees with IGT's decision that the qualifications in the order necessitated a 59(e) motion, that disagreement cannot transform the motion into a JNOV, new trial, or any other motion under the rules. Rather, the disagreement simply makes the motion a 59(e) that should be denied. Made entirely for error preservation, IGT's 59(e) motion asked the trial judge to "specifically *rule*" on the issues previously presented. This is a proper basis for filing a 59(e) motion.

CONCLUSION

The primary issue raised by the Court's opinion here is error preservation when members of the bar and litigants are faced with debatably absent, inexplicit, or unclear rulings of the trial court. IGT faced such an order concerning its initial post-trial motions. In addressing the order, this Court misapprehended, overlooked, and failed to consider the doubt raised by the trial judge's qualified denials of IGT's issues. Instead, the Court made a quantum leap to the conclusion that IGT's second post-trial motion was analogous to the corresponding motion in *Quality Trailer*. This analogy is incorrect when the relief sought in the two motions is actually contrasted.

Secondly, the Court's opinion creates a new legal standard for determining the application of the tolling provision of Rule 203(b)(1). This Court actually conditions, for the first time, the tolling provision on the subsequently determined "appropriateness" of a 59(e) motion. In light of the numerous cases where the Courts have declined to review issues because they were not preserved by a 59(e) motion, this holding places members of the bar in a literal "catch-22" when faced with a questionably unclear post-trial ruling.[8] If a 59(e) motion is not filed because in the attorney's judgment it is not necessary for error preservation, this Court may disagree and refuse to consider the issues. Conversely, if, heeding the Courts' previous error preservation admonitions, the motion *is* filed, this Court

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[8] Judge Anderson recognized this predicament at the hearing when he asked, "Do you think that the law now is in a state where a trial lawyer is presented with the so-called, Catch-22?"

may now subsequently disagree with the attorney's judgment and hold the time for appeal is not tolled. Under either scenario, attorneys and litigants are now faced with abject confusion in how to protect a client's interest in this very common situation.[9]

The Court's holding in this case is a drastic and severe departure from any prior precedent or any rule of court in South Carolina. In fact, it is in opposite juxtaposition to the core principle of the rules: to achieve substantial justice. Dismissing the appeal of a fifteen million dollar judgment against IGT simply because this Court disagrees with the good-faith determination by IGT and its attorneys that the trial judge's lack of explicitness necessitated filing a 59(e) motion does not achieve justice. In fact, this decision tying the tolling provision of Rules 203(b)(1) and 59(f) to this Court's hindsight determination of the appropriateness of IGT's 59(e) motion, being without precedent, substantially unjust, and ignoring previously relied on federal precedent, effectively denies IGT the right to equal protection and due process under law.

In light of these reasons and the unaddressed questions raised by the qualifications in the trial judge's order, IGT respectfully asks this Court to reconsider its order granting Collins' motion to dismiss. Alternatively, IGT asks this Court to vacate its order and certify these important

[9] This sentiment was recognized by Judge Goolsby. He stated, "There's some reason for confusion out there because this is not the first one of these type of cases that we've seen."

issues to the Supreme Court so that it may take and decide the issues on a clean slate.

September 19, 2002

Respectfully submitted,

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ATTORNEYS FOR APPELLANT,
IGT

EXHIBIT A

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	DOCKET NO: 94-CP-26-3266
Collins Music Co., Inc., Plaintiff,	**MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL AND NEW TRIAL REMITTITUR AND MEMORANDUM IN SUPPORT**
vs.	
IGT a/k/a IGT-North America, Defendant.	

With regard to the plaintiff's claims to breach of contract and breach of contract accompanied by fraudulent acts, the defendant IGT hereby moves this Court for any entry of judgment for the defendant IGT notwithstanding the jury verdict rendered in this Court on 2 August 2001, SCRCP 50(b). The defendant IGT also moves this Court for a new trial absolute, or in the alternative for a new trial remittitur with regard to plaintiff's causes of action. Defendant IGT also moves this court for a new trial with regard to all of its counterclaims. SCRCP 59(a)(1).

FACTS

The dispute between the parties arises out of a contractual relationship. IGT is a manufacturer of video gaming equipment and Collins was a purchaser of that equipment. In November of 1991, the parties entered into a comprehensive written agreement. The relationship between these parties is governed by that contract.

In 1994, Collins sought specific performance of this contract, an equitable remedy, in order to avoid alleged irreparable harm – the harm alleged at the time being the inability to acquire equipment. That relief was granted by order of this Court and affirmed by the South Carolina Court of Appeals. Because of that equitable relief, Collins was entitled to continue ordering equipment from IGT and IGT was obligated to supply that equipment and not provide equipment to any other potential user in the State of South Carolina.

ARGUMENTS

1) Collins Elected Its' [sic] Remedy and Made the Law of This Case

Pursuant to Collins' request, the Distributorship Agreement between the parties was effectively extended by injunctive orders of this court from 18 November 1994 until 23 November 1998. As the Court of Appeals noted, this prevented IGT from selling its products to anyone but Collins and continued Collins' contractual rights to acquire IGT products pursuant to the Distributorship Agreement. Thus, Collins' claim of damages for breach of the renewal contingency in the sales order cannot exist; it is barred by the law of *this* case! *Charleston Lumber v. Miller*, 338 S.C. 171, 525 S.E.2d 869 (2000) ("It is well-settled . . . a decision of the Court on a former appeal is the law of the case."). Having specifically asked for and received the equitable relief of specific performance for an alleged breach of contract, Collins is prohibited, as a matter of law, from recovering general damages as a result of the

same breach. *White v. Felkel*, 225 S.C. 453, 82 S.E.2d 813 (1954) (holding that plaintiff could recover special damages[1] following specific performance but *could not* recover general damages for breach). Erroneously, this law of the case was not applied or charged to the jury.[2]

2) Judicial Renewal of Agreement Avoided Collins' Claimed Damages for Non-Renewal

In addition to Collins' damages being prohibited as a matter of law, the granting of Collins' request for specific performance prevented the alleged irreparable harm from ever occurring. Specifically, Collins could not be and was not ever harmed by an inability to purchase IGT equipment because the court ordered IGT to provide machines to Collins. After getting the Court to issue such an order, however, Collins never ordered another machine from IGT.[3]

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[1] Special damages are, of course, those consistent, with the provision of equitable relief and which do not unjustly enrich a claimant. The damages presented by Collins to the jury are not special damages. Likewise, Collins would not be barred from asserting claims of breach for subsequent non-compliance with the Distributorship Agreement. This is not, however, the nature of any of Collins' claims.

[2] IGT's request to charge number. The record will also reflect that IGT counsel even requested a modified version, but it was not charged.

[3] While Collins may now assert that this was because machines were somehow defective, it did not stop Collins from promoting its exclusive relationship with IGT in subsequent documents relating to its' [sic] initial public offering of stock and proposals to Young's Food Stores. And while Collins may now assert that IGT would not sell machines to it, it never sought any contempt citations pursuant to this court's renewal of the distributorship.

3) The Integrated Distributorship Agreement Imposed No Duty to Replicate Pot-[O]-Gold Machines

The parties' written agreement provides in part: "All other . . . agreements or understandings between the parties are herewith fully terminated, it being the intention of the parties that this agreement shall be the *sole* distributorship agreement between the parties." (emphasis added). In further integration of the arrangement between the parties, the agreement provided "All orders for IGT products shall be *in writing on forms provided by IGT* . . . No order . . . shall be binding upon IGT until . . . formally accepted *in writing* . . . " (emphasis added). A standard IGT product is defined by the agreement as "that item which has, prior to the time of customer order, been designed and released to production by IGT and designated as available for sale in the territory. Anything different . . . is a custom alteration." In response to this clear and unambiguous contract language, Collins submitted *no* evidence that the agreement required IGT to produce a Pot-O-Gold replica.

Just as a party to a contract cannot be defrauded by contractual terms he did not bother to read, *Burwell v. SCN*, 288 S[.]C[.] 34, 340 S[.]E[.]2d 786 (1986), Collins cannot impose a contractual obligation to provide a custom product (i.e., a Pot-[O]-Gold replica) when the product to be bought and sold is clearly defined by the contract.[4] Moreover, the

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[4] A duty is owed by every contracting party to the other party and the public "to learn and know the contents of a written contract before he signs and delivers it." *J.B. Bolt Company v. Britt*, 129 S.C. 226, 123 S.E. 845 (1924).

evidence in this record shows a course of dealing between these two merchants which corroborates Collins knowledge of and familiarity with the standard IGT product. Notwithstanding that Collins' "wish list" might include new or different products, Collins' claim is for breach of an *actual* contract, not denial of a non-obligatory "wish list". Therefore, as a matter of law, Collins could not recover damages resulting from the alleged breach of a duty that never existed.

4) No Proof of Breach of IGT's Limited Warranty

Because the parties written agreement expressly included an exclusion of any warranty of merchantability and fitness for purpose,[5] Collins' defective product claims are, as a matter of law, limited to any claim that equipment as delivered did not operate as designed[6] – not as dreamed about. And there is *no evidence* in this record that any IGT equipment did not operate as designed.

5) The Court's Erroneous Charges on UCC Provisions Denied IGT a Fair Trial

Plaintiff's charge request numbered 3, 10, 18, 19 and 21 invited the jury to consider provisions of the Uniform

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[5] Specifically, section G of the agreement provided, in part: "THE WARRANTY STATED IN THIS PARAGRAPH IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES, WRITTEN OR ORAL, STATUTORY, EXPRESS, OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PURPOSE."

[6] *Accord Hill v. BASF Wyandotte*, 696 F.2d 287 (4th Cir. 1982) (holding that salesman's alleged comments could not vary terms of written warranty under the UCC).

Commercial Code as if there were no controlling agreement between the parties. Not only was there a written contract, it was an integrated, non-ambiguous contract. A charge allowing the jury to determine contract terms (plaintiff's #3) when the terms are fully set out in the written agreement is error. Likewise a charge inviting the jury to consider an offer and an acceptance (plaintiff's #10) when the contract expressly provides the method and manner for placing orders is error. The Distributorship Agreement expressly excludes warranties of the Uniform Commercial Code and expressly provides a ten day window to assert a claim under the manufacturer's limited warranty;[7] thus, it was error to charge the jury (plaintiff's #18) that plaintiff had a "reasonable time" to give general notice of a breach. Likewise, the remedy of the limited warranty precludes application of more general code remedies and it was error to charge those remedies (plaintiff's requests #19 and #21).

6) No Proof of A Distinct Fraudulent Act by IGT

While the basis for their damage finding is not specified, the jury in this case did return a verdict for Collins on its claim of Breach of Contract Accompanied by Fraudulent Act. This cause of action has three elements: (1) breach of contract; (2) that the breach was accomplished with a fraudulent intention; and (3) that the breach was accompanied by a fraudulent act. *Harper v. Ethridge*, 290

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[7] Again, section G of the agreement provides, in part: "Distributor shall have ten (10) working days from date of delivery within which to notify IGT of fault at the time of delivery, and, upon IGT request, shall provide each defective component to IGT.".

S.C. 112, 348 S.E.2d 374 (Ct. App. 1986). The law is clear that mere violation of a contract, even if willful and with fraudulent purpose, is not sufficient to make out a claim for breach of contract accompanied by fraudulent act. *Bacot v. Summit Telecommunications, Inc.*, Unpublished Opinion 98-UP-332 (June 25, 1998) (*citing inter alia*, *Smith v. Canal Ins. Co.*, 275 S.C. 256, 269 S.E.2d 348 (1980); *Floyd v. Country Squire Homes, Inc.*, 287 S.C. 51, 336 S.E.2d 520 (Ct. App. 1985).

The only acts alleged to be fraudulent in Collins' complaint (paragraph 28) are part of the acts alleged to constitute the breach (paragraph 18 of the complaint): the alleged failure to provide the latest technology and the delivery of "defective" machines (the only "defect" also being the alleged technology deficiency). Even if IGT intended to breach the parties contract, which it did not, this intent to breach does not establish a separate fraudulent act – one apart from the breach as the law requires. The verdict for breach of contract accompanied by fraudulent act is wholly unsupported by the record in this case. Indeed, the jury's failure to award any punitive damages for this cause of action despite their finding for Collins would seem to corroborate the absence of evidentiary support in the record. Thus, this Court should grant IGT judgment as to this cause of action as a matter of law notwithstanding the jury's verdict in the matter.

7) Collins Claimed Damages are Barred by Judicial Estoppel

By its counterclaim, IGT asserted causes of action for breach of contract, breach of contract accompanied by fraudulent act, fraud, and violation of the South Carolina

Unfair Trade Practices Act. Of critical evidentiary importance to each of these theories is the activity of Collins in placing non-IGT equipment in its route locations – arguably in violation of the Distributorship Agreement. In defense of this practice, Collins was allowed to assert that its route operations involved the lease of *spaces* and not machines, thereby avoiding the contractual restrictions of the distributorship. Similarly, Collins asserted that the Distributorship Agreement, by its terms, did not apply to route operations.

In total contrast to these defensive positions, however, Collins' expert, Dr. Woodside, testified as to damages to both sales *and* route operations as if the contract *did apply* to route operations. Collins cannot have it both ways![6] The doctrine of judicial estoppel prohibits a party that has assumed a particular position in a judicial proceeding from adopting an inconsistent posture in subsequent proceedings. *See e.g., Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997).

In *Hayne*, the South Carolina Supreme Court recognized the real purpose of judicial estoppel – to preserve the integrity of the judicial process by preventing manipulation. The Court said,

> In order for the judicial process to function properly, litigants much [sic] approach it in a truthful manner. Although parties may vigorously assert

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[6] Or as Judge Anderson puts it, "a litigant cannot 'blow both hot and cold'." *Quinn v. Quinn*, 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000) (Honorable Ralph King Anderson concurring).

> their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.

327 S.C. at 251-252. To allow the jury's verdict for Collins to stand would undermine our system of justice by rewarding a deceptive litigant who plays "fast-and-loose"[9] with the courts.

The impact of Collins' manipulations on this court are unavoidable. For example, at the pre-trial summary judgement hearing, the court held that the individual machine agreements used in route operations raised issues of fact inappropriate for summary disposition. At trial, however, when IGT sought to hold Collins to its previous factual position by invoking estoppel, this court held, apparently as a matter of law, that the individual machine agreements were neither leases of space. But again, not finished with its manipulations, Collins argued to the jury that the machine agreements were leases of space – despite the court's ruling! To allow such twisting makes a mockery of our judicial system.

Accordingly, IGT moves this Court for a judgment against the plaintiff's claims notwithstanding the verdict because Collins should have been judicially estoppel [sic]

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[9] Again, Judge Anderson's choice of words, *Quinn*, but *certainly* applicable here.

from asserting those claims. In the alternative, IGT moves for a new trial on plaintiff's claims so that the doctrine of judicial estoppel can be properly applied to limit those claims. Finally, as a third alternative, IGT would move this Court for a new trial *nisi remititur* on the grounds that the damages awarded by the jury are inconsistent with the Collins' defensive position that the Distributorship Agreement does not apply to route operations; a more consistent damage award would be limited to the alleged impact on machine sales which plaintiff's expert Woodside calculated to be $2,099,629.00.

8) Collins' Claimed Breach and Damages are Barred by Judicial Admissions

At trial, Collins asserted that on March 28, 1994, there was an anticipatory breach of the sales order requiring renewal of the Distributorship Agreement. Collins was allowed to argue that its failure to consummate the product order was really the result of this alleged anticipatory breach. However, Collins' pleadings[10] are inconsistent with Collins' present position and have not been amended; specifically, these pleadings state that the product was found to be "improperly" programmed and "after discovery of the various problems with the machines delivered . . ., the plaintiff, on March 31, 1994, immediately canceled the shipment of any further machines." Again, in contrast, Collins argued at trial that an IGT breach occurred on March 28, 1994 and this resulted in the cancellation of the product order.

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[10] *See* Paragraphs 13 and 14 of Collins' Amended Complaint.

"Parties to an action are judicially concluded and bound by [either pleadings] unless withdrawn, altered or stricken by amendment or otherwise . . . **[A] party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings.**" *Walton v. Wal-Mart*, (4th Cir. 1997) (emphasis added) (quoting *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410, 416 (1964)). Thus, the breach and damages now asserted by Collins should not have been allowed and judgment on plaintiff's claims should be entered for the defendant notwithstanding the verdict.

Following this Court's refusal to apply judicial admissions to bar Collins' claims, IGT sought, as an alternative, the admission (into evidence) or publication (to the jury) of Collins' pleadings. Again, this Court refused to allow the admission or publication of these pleadings as judicial admissions. Instead, the Court allowed IGT attorneys to mention the pleadings in argument – only to have that argument subsequently nullified by the court's proper instruction that attorney argument does not constitute evidence. Absent applying judicial admissions to bar Collins' claims as a matter of law, the court's failure to allow the admission or publication of these admissions denied IGT a fair trial – both as to its' defenses to Collins' claims and as to its' counterclaims. Thus, a new trial should be given.

9) Collins' Claimed Damages are Barred by Collateral Estoppel

The damages sought by Collins in this matter have been unsuccessfully sought by Collins' before against a different target; specifically, Collins' damages expert, Dr.

Perry Woodside, has testified in other forums as the result of claims brought by Collins. In those matters, Woodside has also calculated damages for the same time period – calendar years 1995, 1996 and 1997 – and for the same alleged loss – the purported inability to capture the entire South Carolina market for Pot-O-Gold type machines. In *Collins v. Leisure Time*, a jury actually returned a verdict of liability for Collins against that lone target but awarded nothing in damages – this judicial evaluation of this both liability and damages acts as a bar to any subsequent attempt to assert the same theories. The doctrine of collateral estoppel, specifically issue preclusion, now well recognized by the courts of this state, precludes a party from relitigating an issue which was decided in a previous action. *See e.g.*, *Graham v. State Farm*, 277 S.C. 389, 287 S.E.2d 495 (1982) ("the plaintiff has had his day in court and society is interested in an end of litigation.").[11]

10) Collins' Claimed Damages Were <u>Not</u> Caused by IGT

The damages described by Collins' expert Woodside again consisted of Collins' alleged inability to capture more of the market for Pot-O-Gold or Pot-O-Gold type equipment. The record before this Court demonstrates, however, that the only restrictions on Collins' ability to acquire actual Pot-O-Gold machines is his own conduct: First, in failing to meet a purchase quota and thereby

[11] Following the court's refusal to invoke the doctrine of collateral estoppel to bar Collins' claim, IGT also sought to introduce at trial of this matter the verdict form from *Collins v. Leisure Time* as well as testimonial evidence of that verdict; this evidence was not allowed.

losing his exclusive distribution status with that manufacturer;[12] and secondly, entering into an agreement with WMS which limited the percentage of machines he could buy from others.[13] Because this causation is the *only* theory supported by the record in this case, the Court should grant IGT judgment on the plaintiff's claims notwithstanding the verdict.

11) Collins' Claimed Damages are Barred by Public Policy

The damages calculated by Dr. Woodside in this case, claimed by Collins, and submitted by this Court to the jury are based upon a market evaluation of Pot-[O]-Gold machines without any regard to limitations imposed by Collins' contractual relationship with WMS.[14] The record clearly reflects,[15] however, that Collins had a minimum purchase requirement from WMS of 30% of Collins' total annual purchases. The record also reflects the number of machines purchased each year from WMS. There is no testimony that the number of WMS machines would have changed. Accordingly, Collins is contractually limited in

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[12] This status would have otherwise continued through May of 1998. It is this failure of Collins that directly and proximately allowed another, Drews, into the market – *not any conduct of IGT.*

[13] There is evidence in the record, however, that Collins did not let the WMS restriction stand in the way of purchasing Pot-[O]-Gold machines.

[14] From March 1994 through 1998, Collins was the exclusive distributor of WMS machines in South Carolina and as such had unlimited access to WMS products for both sales and routes.

[15] Indeed, corporate president and CEO Fred Collins admitted these purchase requirements.

the number of machines it could legally purchase from any other source – 70% of the total with the total number of machines calculated by dividing the number of WMS machines by 30%; these numbers are in the record for each of the relevant years.

Ignoring the restriction imposed by the WMS agreement, Dr. Woodside presented the jury with damage calculations assuming Collins had the ability to purchase Pot-O-Gold type machines from IGT in excess of the cap created by the WMS agreement – which would clearly violate the WMS agreement. Indeed the undisputed record shows that Collins did buy actual Pot-O-Gold machines up to (and exceeding) the cap imposed by his own agreement with WMS. For this Court to allow damages based upon further violation of a binding contract between the claimant and another party violates public policy.[16] Thus, this Court should grant IGT judgment notwithstanding the verdict with regard to Collins' claimed damages.

12) IGT's Claim Were Defeated By An Erroneous Failure To Apply Judicial Estoppel

By its counterclaim, IGT asserted causes of action for breach of contract, breach of contract accompanied by fraudulent act, fraud, and violation of the South Carolina Unfair Trade Practices Act. As with the defense of Collins

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[16] *Accord Bradley v. Somers*, 283 S.C. 365, 322 S.E.2d 665 (1984) (holding plaintiff may not recover damages where to allow such recovery would reward wrongdoing – in context of now abolished breach of promise to marry suit); *See Also* 17A C.J.S. Contracts §281 p. 285 ("If a plaintiff must rely on an illegal contract to establish a cause of action, he or she may not recover for damages that would otherwise be due.")

claimed damages, of critical evidentiary importance to each of these theories is the activity of Collins in placing non-IGT equipment in its route locations – arguably in violation of the Distributorship Agreement. In defense of this practice, Collins was allowed to assert that its route operations involved the lease of *spaces* and not machines, thereby avoiding the contractual restrictions of the distributorship.

IGT asserted and continued to assert that Collins should be estopped from making this space-leasing argument now as it is inconsistent with positions taken by Collins both in this case and others. Because the Court failed to apply the doctrine of judicial estoppel, Collins was allowed to take advantage of inconsistent factual positions and IGT was denied a fair trial of its damage claims. This Court should grant IGT a new trial on its counterclaims.

13) IGT's Claims Were Defeated by An Erroneous Failure to Allow Publication of Judicial Admissions

In its presentation of its counterclaim, IGT sought to demonstrate to the jury that it was in fact Collins who breached the parties' agreement by the refusing to comply with the product order placed in compliance with the terms of the Distributorship Agreement. In contrast, Collins has asserted an anticipatory breach by IGT through an alleged failure to renew; at trial, Collins suggested that its failure to comply with the product order was really the result of the alleged anticipatory breach. To rebut Collins' assertion and support its claim of breach,

IGT sought to introduce plaintiff's pleadings[17] which are inconsistent with Collins' present position. This Court refused to allow the admission or publication of these pleadings as judicial admissions. Because this erroneous failure denied IGT a fair trial on its counterclaims, a new trial on these counterclaims should be ordered.

14) Collins' Acts Have Public Impact Under the S.C.U.T.P.A.

The Court granted Collins' Motion for Directed Verdict with regard to IGT's claims under the South Carolina Unfair Trade Practices Act. This ruling was based on an erroneous application of the public impact requirement; therefore, IGT should be granted a new trial.

The public impact requirement of the Unfair Trade Practices Act does not require the potential for repetition of the exact same acts between the exact same parties, it may be satisfied when the potential exists for the targeted party to commit the same or similar acts in the marketplace – a marketplace beyond the simple relationship between two private parties.[18] Clearly that potential exists in this case! The record is replete with evidence that Collins is deeply involved in the gaming marketplace and has many similar relationships with other manufacturers.

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[17] Specifically, IGT sought to publish Paragraphs 13 and 14 of Collins' Amended Complaint.

[18] In fact, the 1996 South Carolina Supreme [Court] case of *Daisy Outdoor Advertising v. Abbott,* 322 S.C. 489, 473 S.E.2d 47, makes it clear that there is no single method of demonstrating public impact and that the Act even protects commercial members of the public from unfair and deceptive acts.

Moreover, it is difficult to imagine an industry in which the public might have greater interest or greater need to allow effective private enforcement against deceptive acts and practices. Again, even though certain aspects of video gaming are now prohibited in this state, other forms continue[19] and the record confirms Collins involvement. Finally, while it is this state's statute that IGT asserts, there is nothing that restricts the potential benefits of its application to this state. Indeed, in today's marketplace – particularly the gaming market, the harmful potential of deceptive acts and practices knows no boundry [sic]. Our legislature surely did not intend to exempt bad actors from the enforcement potential of this Act even if the potential future victims were limited to non-residents of our state.

15) Court's other Evidentiary Rulings Denied IGT Fair Trial

In addition to those evidentiary rulings previously referenced, this court refused to allow complete cross-examination of Fred Collins. Specifically, IGT sought to attack the credibility of this witness using his financial information which could convince the jury of bias;[20] despite

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[19] Indeed, as pointed out in motions before this Court, the South Carolina Supreme Court ruled as recently as last week, July 30th, that possession of video gambling equipment on marine vessels in this state was not prohibited by existing statutes and neither was operation of such equipment on day cruises outside the state's territorial waters. *Stardancer Casino, Inc. v. State,* Opinion 25335, 2001 Lexis 141 (July 30, 2001).

[20] An example of the information sought to be introduced was confirmation of Collins' corporate minutes which reflected a debt by this

(Continued on following page)

allowing financial information regarding IGT, this evidence was not allowed. Moreover, Collins was allowed to present evidence that it could not afford to pay its employees while IGT was not allowed to show the financial drain to the corporation of the witness' own salary and bonus. This evidence was not insignificant – this was the principal witness for the plaintiff corporation; moreover, to allow the jury an unbalanced picture of the relative wealth of the parties only exacerbated the harmfulness of this error.

Another example of a significant error with regard to evidence and the examination of witnesses was the court's requirement that cross-examination of Collins' expert Woodside regarding the impact of Collins separate contract with WMS be asked in hypothetical format as if the WMS contract did not exist or were unproven, when in fact, the WMS contract had previously been admitted into evidence without objection. To further compound this error, the Court instructed the jury that hypothetical questions were not evidence and should not be considered. Again, this evidence was quite harmful – this was Collins' expert on damages who offered opinions as to the alleged financial harm done to Collins by acts of IGT.

The court's rulings denied IGT a fair trial; accordingly, a new trial should be granted.

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witness to the corporation of approximately 7 million dollars. Another example would be the amount of the corporation's expense in compensating the witness in his role as corporate president.

15) Court's Other Rulings Denied IGT Fair Trial

IGT hereby incorporates any and all of its trial objections and request for rulings. The totality of the record in this case makes it clear that justice has not been done. Errors and manipulation have allowed an unbalanced and unfair presentation to the jury. This court should remedy this grave injustice by granting a new trial.

TURNER, PADGET, GRAHAM & LANEY, P.A.

By: /s/ _____

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ATTORNEYS FOR DEFENDANT

Florence, SC

August ___, 2001

EXHIBIT B

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	DOCKET NO: 94-CP-26-3266
Collins Music Co., Inc., Plaintiff, vs. IGT a/k/a IGT-North America, Defendant.	**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL AND NEW TRIAL REMITTITUR**

Defendant IGT a/k/a IGT-North America (hereinafter "IGT") hereby files this Memorandum in support of its Motions for Judgment Notwithstanding the Verdict, New Trial and New Trial Remittitur.

FACTS

The dispute between the parties arises out of a contractual relationship. IGT is a manufacturer of video gaming equipment and Collins was a purchaser of that equipment. In November of 1991, the parties entered into a comprehensive written agreement. The relationship between these parties is governed by that contract.

In 1994, Collins sought specific performance of this contract, an equitable remedy, in order to avoid alleged irreparable harm – the harm alleged at the time being the inability to acquire equipment. That relief was granted by Order of this Court on November 18, 1994. Because of that equitable relief, Collins was entitled to continue ordering equipment from IGT and IGT was obligated to supply that equipment pursuant to terms set forth in the parties' 1991

Distributorship Agreement. The Court further ordered IGT not to provide equipment to any other potential user in the State of South Carolina during the term of the injunction.

ARGUMENTS

1) Collins Elected Its' [sic] Remedy and Made the Law of This Case

Pursuant to Collins' request, the Distributorship Agreement between the parties was effectively extended by injunctive order of this Court from November 18, 1994 until November 23, 1998. As the Court of Appeals noted, this prevented IGT from selling its products to anyone but Collins and continued Collins' contractual rights to acquire IGT products pursuant to the Distributorship Agreement. Thus, Collins' claim of damages for breach of the renewal contingency in the sales order cannot exist; it is barred by the law of *this* case. *Charleston Lumber v. Miller,* 338 S.C. 171, 525 S.E.2d 869 (2000) ("It is well-settled . . . a decision of the Court on a former appeal is the law of the case.").

Having specifically asked for and received the equitable relief of specific performance for an alleged breach of contract, Collins is prohibited, as a matter of law, from recovering general damages as a result of the same breach. *White v. Felkel,* 225 S.C. 453, 82 S.E.2d 813 (1954) (holding that plaintiff could recover special damages[1]

[1] Special damages are, of course, those consistent with the provision of equitable relief and which do not unjustly enrich a claimant. The damages presented by Collins to the jury are not special damages. Likewise, Collins would not be barred from asserting claims of breach for subsequent non-compliance with the Distributorship Agreement. This is not, however, the nature of any of Collins' claims.

following specific performance but *could not* recover general damages for breach). Additionally, the evidence was undisputed that Collins continued to market itself as the exclusive distributor of IGT products in South Carolina *after* November 18, 1994. This marketing was an attempt by Collins to gain an advantage with regards to potential customers and to increase the potential value of Collins' proposed Initial Public Offering. Erroneously, this law of the case was not applied or charged to the jury.[2]

2) Judicial Renewal of Agreement Avoided Collins' Claimed Damages for Non-Renewal

In addition to Collins' damages being prohibited as a matter of law, the granting of Collins' request for specific performance prevented the alleged irreparable harm from ever occurring. Specifically, Collins could not be and was not ever harmed by an inability to purchase IGT equipment because the Court ordered IGT to provide machines to Collins. However, after getting the Court to issue such an order, Collins never ordered another machine from IGT.[3]

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[2] IGT's request to charge number 25. The record will also reflect that IGT counsel even requested a modified version, but it was not charged.

[3] While Collins may now assert that this was because machines were somehow defective, it did not stop Collins from promoting its exclusive relationship with IGT in subsequent documents relating to its' [sic] initial public offering of stock and proposals to Young's Food Stores. And while Collins may now assert that IGT would not sell machines to it, it never sought any contempt citations pursuant to this Court's renewal of the distributorship. (*See Plum Creek Development Co., Inc. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999)).

3) The Integrated Distributorship Agreement Imposed No Duty to Replicate Pot-[O]-Gold Machines

The parties' written agreement provides in part: "All other . . . agreements or understandings between the parties are herewith fully terminated, it being the intention of the parties that this agreement shall be the *sole* distributorship agreement between the parties." (emphasis added). In further integration of the arrangement between the parties, the agreement provided "All orders for IGT products shall be *in writing on forms provided by IGT* . . . No order . . . shall be binding upon IGT until . . . formally accepted *in writing* . . . " (emphasis added). A standard IGT product is defined by the agreement as "that item which has, prior to the time of customer order, been designed and released to production by IGT and designated as available for sale in the territory. Anything different . . . is a custom alteration." In response to this clear and unambiguous contract language, Collins submitted *no* evidence that the agreement required IGT to produce a Pot-O-Gold replica.

Collins' damages argued and submitted to the jury for its consideration were based upon contractual duties not set forth in the Distributorship Agreement. The Court's failure to grant IGT's motion for directed verdict and/or, strike Collins' specific allegations of breach as set forth in paragraph 18 of Collins' complaint was error. Collins' damages submitted to the jury covered a time period from November of 1994 through November of 1997. In order for Collins to have suffered any contractual damages during this time period, the duties of IGT as set forth in the 1991 Distributorship Agreement would have to be rewritten and/or implied to include a duty to provide Collins with a product equivalent to a competitor's product. As a matter

of law, no such duty is found within the four corners of the 1991 Distributorship Agreement.

Just as a party to a contract cannot be defrauded by contractual terms he did not bother to read, *Burwell v. SCN,* 288 S[.]C[.] 34, 340 S[.]E[.]2d 786 (1986), Collins cannot impose a contractual obligation to provide a custom product (i.e., a Pot-[O]-Gold replica) when the product to be bought and sold is clearly defined by the contract.[4] Moreover, the evidence in this record shows a course of dealing between these two merchants which corroborates Collins knowledge of and familiarity with the standard IGT product. Notwithstanding that Collins' "wish list" might include new or different products, Collins' claim is for breach of an *actual* contract, not denial of a non-obligatory "wish list". Therefore, as a matter of law, Collins could not recover damages resulting from the alleged breach of a duty that never existed.

4) No Proof of Breach of IGT's Limited Warranty

Because the parties written agreement expressly included an exclusion of any warranty of merchantability and fitness for purpose,[5] Collins' defective product claims

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[4] A duty is owed by every contracting party to the other party and the public "to learn and know the contents of a written contract before he signs and delivers it." *J.B. Bolt Company v. Britt*, 129 S.C. 226, 123 S.E. 845 (1924).

[5] Specifically, section G of the agreement provided, in part: "THE WARRANTY STATED IN THIS PARAGRAPH IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES, WRITTEN OR ORAL, STATUTORY, EXPRESS, OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PURPOSE."

are, as a matter of law, limited to any claim that equipment as delivered did not operate as designed[6] – not as dreamed about. And there is *no evidence* in this record that any IGT equipment did not operate as designed.

5) The Court's Erroneous Charges on UCC Provisions Denied IGT a Fair Trial

Plaintiff's charge request numbered 3, 10, 18, 19 and 21 invited the jury to consider provisions of the Uniform Commercial Code as if there were no controlling agreement between the parties. Not only was there a written contract, it was an integrated, non-ambiguous contract. A charge allowing the jury to determine contract terms (plaintiffs #3) when the terms are fully set out in the written agreement is error. Likewise a charge inviting the jury to consider an offer and an acceptance (plaintiff's #10) when the contract expressly provides the method and manner for placing orders is error. The Distributorship Agreement expressly excludes warranties of the Uniform Commercial Code and expressly provides a ten day window to assert a claim under the manufacturer's limited warranty;[7] thus, it was error to charge the jury (plaintiff's #18) that plaintiff had a "reasonable time" to give general notice of a breach. Likewise, the remedy of the limited

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[6] *Accord Hill v. BASF Wyandotte,* 696 F.2d 287 (4th Cir. 1982) (holding that salesman's alleged comments could not vary terms of written warranty under the UCC).

[7] Again, section G of the agreement provides, in part: "Distributor shall have ten (10) working days from date of delivery within which to notify IGT of fault at the time of delivery, and, upon IGT request, shall provide each defective component to IGT.".

warranty precludes application of more general code remedies and it was error to charge those remedies (plaintiff's requests #19 and #21).

6) No Proof of A Distinct Fraudulent Act by IGT

While the basis for their damage finding is not specified, the jury in this case did return a verdict for Collins on its claim of Breach of Contract Accompanied by Fraudulent Act. This cause of action has three elements: (1) breach of contract; (2) that the breach was accomplished with a fraudulent intention; and (3) that the breach was accompanied by a fraudulent act. *Harper v. Ethridge,* 290 S.C. 112, 348 S.E.2d 374 (Ct. App. 1986). The law is clear that mere violation of a contract, even if willful and with fraudulent purpose, is not sufficient to make out a claim for breach of contract accompanied by fraudulent act. *Bacot v. Summit Telecommunications, Inc.*, Unpublished Opinion 98-UP-332 (June 25, 1998) (*citing inter alia, Smith v. Canal Ins. Co.,* 275 S.C. 256, 269 S.E.2d 348 (1980); *Floyd v. Country Squire Homes, Inc.,* 287 S.C. 51, 336 S.E.2d 520 (Ct. App. 1985).

The only acts alleged to be fraudulent in Collins' complaint (paragraph 28) are part of the acts alleged to constitute the breach (paragraph 18 of the complaint): the alleged failure to provide the latest technology and the delivery of "defective" machines (the only "defect" also being the alleged technology deficiency). Even if IGT intended to breach the parties contract, which it did not, this intent to breach does not establish a separate fraudulent act – one apart from the breach as the law requires. The verdict for breach of contract accompanied by fraudulent act is wholly unsupported by the record in this case.

Indeed, the jury's failure to award any punitive damages for this cause of action despite their finding for Collins would seem to corroborate the absence of evidentiary support in the record. Thus, this Court should grant IGT judgment as to this cause of action as a matter of law notwithstanding the jury's verdict in the matter.

7) Collins Claimed Breaches and Damages are Barred by Judicial Estoppel

By its counterclaim, IGT asserted causes of action for breach of contract, breach of contract accompanied by fraudulent act, fraud, and violation of the South Carolina Unfair Trade Practices Act. Of critical evidentiary importance to each of these theories is the activity of Collins in placing non-IGT equipment in its route locations – arguably in violation of the Distributorship Agreement. In defense of this practice, Collins was allowed to assert that its route operations involved the lease of *spaces* and not machines, thereby avoiding the contractual restrictions of the distributorship. Similarly, Collins asserted that the Distributorship Agreement, by its terms, did not apply to route operations.

In total contrast to these defensive positions, however, Collins' expert, Dr. Woodside, testified as to damages to both sales *and* route operations as if the contract *did apply* to route operations. Collins cannot have it both ways![8] The doctrine of judicial estoppel prohibits a party

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[8] Or as Judge Anderson puts it, "a litigant cannot 'blow both hot and cold'." *Quinn v. Quinn*, 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000) (Honorable Ralph King Anderson concurring).

that has assumed a particular position in a judicial proceeding from adopting an inconsistent posture in subsequent proceedings. *See e.g., Hayne Federal Credit Union v. Bailey,* 327 S.C. 242,489 S.E.2d 472 (1997).

On November 17, 1994, Collins moved before the Court for specific performance and injunctive relief. In so doing, Collins was required to make a prima facie showing to the Court that it would suffer irreparable harm if it lost its ability to purchase IGT video gaming machines. Collins presented testimony by way of affidavit and sworn testimony in open court that the Distributorship Agreement limited his ability to place competitor's equipment on his routes and limited the sale of competitor's equipment. By taking this factual position, Collins gained an advantage in this case and was successful in persuading the Court to grant the relief sought. Not only has Collins taken an inconsistent factual position to gain an advantage in this litigation, but Collins has also taken an inconsistent factual position with regards to the leasing of machines in other litigation in order to gain an unfair advantage. It was error for this Court not to apply the doctrine of judicial estoppel.

In *Hayne,* the South Carolina Supreme Court recognized the real purpose of judicial estoppel – to preserve the integrity of the judicial process by preventing manipulation. The Court said,

> In order for the judicial process to function properly, litigants much approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system

> lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.

327 S.C. at 251-252. To allow the jury's verdict for Collins to stand would undermine our system of justice by rewarding a deceptive litigant who plays "fast-and-loose"[9] with the courts.

The impact of Collins' manipulations on this court are unavoidable. For example, at the pre-trial summary judgment hearing, the Court held that the individual machine agreements used in route operations raised issues of fact inappropriate for summary disposition. At trial, however, when IGT sought to hold Collins to its previous factual position by invoking estoppel, this Court held, apparently as a matter of law, that the individual machine agreements were neither leases of machines or space. But again, not finished with its manipulations, Collins argued to the jury that the machine agreements were leases of space – despite the Court's ruling! To allow such twisting makes a mockery of our judicial system.

Accordingly, IGT moves this Court for a judgment against the plaintiff's claims notwithstanding the verdict because Collins should have been judicially estoppe[d] from asserting those claims. In the alternative, IGT moves for a new trial on plaintiff's claims so that the doctrine of judicial estoppel can be properly applied to limit those claims. Finally, as a third alternative, IGT would move

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[9] Again, Judge Anderson's choice of words, *Quinn*, but *certainly* applicable here.

this Court for a new trial *nisi remittitur* on the grounds that the damages awarded by the jury are inconsistent with the Collins' defensive position that the Distributorship Agreement does not apply to route operations; a more consistent damage award would be limited to the alleged impact on machine sales which plaintiff's expert Woodside calculated to be $2,099,629.00.

8) Collins' Claimed Breach and Damages are Barred by Judicial Admissions

At trial, Collins asserted that on March 28, 1994, there was an anticipatory breach of the sales order requiring renewal of the Distributorship Agreement. Collins was allowed to argue that its failure to consummate the product order was really the result of this alleged anticipatory breach. However, Collins' pleadings[10] are inconsistent with Collins' present position and have not been amended; specifically, these pleadings state that the product was found to be "improperly" programmed and "after discovery of the various problems with the machines delivered . . . , the plaintiff, on March 31, 1994, immediately canceled the shipment of any further machines." Again, in contrast, Collins argued at trial that an IGT breach occurred on March 28, 1994 and this resulted in the cancellation of the product order.

"Parties to an action are judicially concluded and bound by [either pleadings] unless withdrawn, altered or stricken by amendment or otherwise . . . **[A] party cannot subsequently take a position contradictory of,**

[10] *See* Paragraphs 13 and 14 of Collins' Amended Complaint.

or inconsistent with, his pleadings." *Walton v. Wal-Mart*, (4th Cir. 1997) (emphasis added) (quoting *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410, 416 (1964)). Thus, the breach and damages now asserted by Collins should not have been allowed and judgment on plaintiff's claims should be entered for the defendant notwithstanding the verdict.

Following this Court's refusal to apply judicial admissions to bar Collins' claims, IGT sought, as an alternative, the admission (into evidence) or publication (to the jury) of Collins' pleadings. Again, this Court refused to allow the admission or publication of these pleadings as judicial admissions. Instead, the Court allowed IGT attorneys to mention the pleadings in argument – only to have that argument subsequently nullified by the court's proper instruction that attorney argument does not constitute evidence. Absent applying judicial admissions to bar Collins' claims as a matter of law, the [C]ourt's failure to allow the admission or publication of these admissions denied IGT a fair trial – both as to its' [sic] defenses to Collins' claims and as to its' [sic] counterclaims. Thus, a new trial should be given.

9) Collins' Claimed Damages are Barred by Collateral Estoppel

The damages sought by Collins in this matter have been unsuccesfully sought by Collins' before against a different target; specifically, Collins' damages expert, Dr. Perry Woodside, has testified in other forums as the result of claims brought by Collins. In those matters, Woodside has also calculated damages for the same time period – calendar years 1995, 1996 and 1997 – and for the same

alleged loss – the purported inability to capture the entire South Carolina market for Pot-O-Gold type machines. In *Collins v. Leisure Time,* a jury actually returned a verdict of liability for Collins against that lone target but awarded nothing in damages – this judicial evaluation of both liability and damages acts as a bar to any subsequent attempt to assert the same theories. The doctrine of collateral estoppel, specifically issue preclusion, now well recognized by the courts of this state, precludes a party from relitigating an issue which was decided in a previous action. *See e.g., Graham v. State Farm,* 277 S.C. 389, 287 S.E.2d 495 (1982) ("the plaintiff has had his day in court and society is interested in an end of litigation.").[11]

10) Collins' Claimed Damages Were <u>Not</u> Caused by IGT

The damages described by Collins' expert Woodside again consisted of Collins' alleged inability to capture more of the market for Pot-O-Gold or Pot-O-Gold type equipment. The record before this Court demonstrates, however, that the only restrictions on Collins' ability to acquire actual Pot-O-Gold machines is his own conduct: First, in failing to meet a purchase quota and thereby losing his exclusive distribution status with that manufacturer[12]; and

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[11] Following the [C]ourt's refusal to invoke the doctrine of collateral estoppel to bar Collins' claim, IGT also sought to introduce at trial of this matter the verdict form from *Collins v. Leisure Time* as well as testimonial evidence of that verdict; this evidence was not allowed.

[12] This status would have otherwise continued through May of 1998. It is this failure of Collins that directly and proximately allowed another, Drews, into the market – *not any conduct of IGT.*

secondly, entering into an agreement with WMS which limited the percentage of machines he could buy from others.[13] Because this causation is the *only* theory supported by the record in this case, the Court should grant IGT judgment on the plaintiff's claims notwithstanding the verdict.

11) Collins' Claimed Damages are Barred by Public Policy

The damages calculated by Dr. Woodside in this case, claimed by Collins, and submitted by this Court to the jury are based upon a market evaluation of Pot-O-Gold machines without any regard to limitations imposed by Collins' contractual relationship with WMS.[14] The record clearly reflects,[15] however, that Collins had a minimum purchase requirement from WMS of 30% of Collins' total annual purchases. The record also reflects the number of machines purchased each year from WMS. There is no testimony that the number of WMS machines would have changed. Accordingly, Collins is contractually limited in the number of machines it could legally purchase from any other source – 70% of the total with the total number of machines calculated by dividing the number of WMS

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[13] There is evidence in the record, however, that Collins did not let the WMS restriction stand in the way of purchasing Pot-[O]-Gold machines.

[14] From March 1994 through 1998, Collins was the exclusive distributor of WMS machines in South Carolina and as such had unlimited access to WMS products for both sales and routes.

[15] Indeed, corporate president and CEO Fred Collins admitted these purchase requirements.

machines by 30%; these numbers are in the record for each of the relevant years.

Ignoring the restriction imposed by the WMS agreement, Dr. Woodside presented the jury with damage calculations assuming Collins had the ability to purchase Pot-O-Gold type machines from IGT in excess of the cap created by the WMS agreement – which would clearly violate the WMS agreement. Indeed the undisputed record shows that Collins did buy actual Pot-O-Gold machines up to (and exceeding) the cap imposed by his own agreement with WMS. For this Court to allow damages based upon further violation of a binding contract between the claimant and another party violates public policy.[16] Thus, this Court should grant IGT judgment notwithstanding the verdict with regard to Collins' claimed damages.

12) IGT's Claims Were Defeated By An Erroneous Failure To Apply Judicial Estoppel

By its counterclaim, IGT asserted causes of action for breach of contract, breach of contract accompanied by fraudulent act, fraud, and violation of the South Carolina Unfair Trade Practices Act. As with the defense of Collins claimed damages, of critical evidentiary importance to each of these theories is the activity of Collins in placing non-IGT equipment in its route locations – arguably in

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[16] *Accord Bradley v. Somers,* 283 S.C. 365, 322 S.E.2d 665 (1984) (holding plaintiff may not recover damages where to allow such recovery would reward wrongdoing – in context of now abolished breach of promise to marry suit); [*s*]*ee* [*a*]*lso* 17A C.J.S. Contracts §281 p. 285 ("If a plaintiff must rely on an illegal contract to establish a cause of action, he or she may not recover for damages that would otherwise be due.")[.]

violation of the Distributorship Agreement. In defense of this practice, Collins was allowed to assert that its route operations involved the lease of *spaces* and not machines, thereby avoiding the contractual restrictions of the distributorship.

IGT asserted and continued to assert that Collins should be estopped from making this space-leasing argument now as it is inconsistent with positions taken by Collins both in this case and others. Because the Court failed to apply the doctrine of judicial estoppel, Collins was allowed to take advantage of inconsistent factual positions and IGT was denied a fair trial of its damage claims. This Court should grant IGT a new trial on its counterclaims.

13) IGT's Claims Were Defeated by An Erroneous Failure to Allow Publication of Judicial Admissions

In its presentation of its counterclaim, IGT sought to demonstrate to the jury that it was in fact Collins who breached the parties' agreement by the refusing to comply with the product order placed in compliance with the terms of the Distributorship Agreement. In contrast, Collins has asserted an anticipatory breach by IGT through an alleged failure to renew; at trial, Collins suggested that its failure to comply with the product order was really the result of the alleged anticipatory breach. To rebut Collins' assertion and support its claim of breach, IGT sought to introduce plaintiff's pleadings[17] which are

[17] Specifically, IGT sought to publish Paragraphs 13 and 14 of Collins' Amended Complaint.

inconsistent with Collins' present position. This Court refused to allow the admission or publication of these pleadings as judicial admissions. Because this erroneous failure denied IGT a fair trial on its counterclaims, a new trial on these counterclaims should be ordered.

14) Collins' Acts Have Public Impact Under the S.C.U.T.P.A.

The Court granted Collins' Motion for Directed Verdict with regard to IGT's claims under the South Carolina Unfair Trade Practices Act. This ruling was based on an erroneous application of the public impact requirement; therefore, IGT should be granted a new trial.

The public impact requirement of the Unfair Trade Practices Act does not require the potential for repetition of the exact same acts between the exact same parties, it may be satisfied when the potential exists for the targeted party to commit the same or similar acts in the marketplace – a marketplace beyond the simple relationship between two private parties.[18] Clearly that potential exists in this case! The record is replete with evidence that Collins is deeply involved in the gaming marketplace and has many similar relationships with other manufacturers.

Moreover, it is difficult to imagine an industry in which the public might have greater interest or greater

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[18] In fact, the 1996 South Carolina Supreme [Court] case of *Daisy Outdoor Advertising v. Abbott,* 322 S.C. 489, 473 S.E.2d 47, makes it clear that there is no single method of demonstrating public impact and that the Act even protects commercial members of the public from unfair and deceptive acts.

need to allow effective private enforcement against deceptive acts and practices. Again, even though certain aspects of video gaming are now prohibited in this state, other forms continue[19] and the record confirms Collins' involvement. Finally, while it is this state's statute that IGT asserts, there is nothing that restricts the potential benefits of its application to this state. Indeed, in today's marketplace – particularly the gaming market, the harmful potential of deceptive acts and practices knows no boundry [sic]. Our legislature surely did not intend to exempt bad actors from the enforcement potential of this Act even if the potential future victims were limited to non-residents of our state.

15) Court's [O]ther Evidentiary Rulings Denied IGT Fair Trial

In addition to those evidentiary rulings previously referenced, this [C]ourt refused to allow complete cross-examination of Fred Collins. Specifically, IGT sought to attack the credibility of this witness using his financial information which could convince the jury of bias;[20] despite

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[19] Indeed, as pointed out in motions before this Court, the South Carolina Supreme Court ruled as recently as last week, July 30th, that possession of video gambling equipment on marine vessels in this state was not prohibited by existing statutes and neither was operation of such equipment on day cruises outside the state's territorial waters. *Stardancer Casino, Inc. v. State,* Opinion 25335, 2001 Lexis 141 (July 30, 2001).

[20] An example of the information sought to be introduced was confirmation of Collins' corporate minutes which reflected a debt by this witness to the corporation of approximately 7 million dollars. Another example would be the amount of the corporation's expense in compensating the witness in his role as corporate president.

allowing financial information regarding IGT, this evidence was not allowed. Moreover, Collins was allowed to present evidence that it could not afford to pay its employees while IGT was not allowed to show the financial drain to the corporation of the witness' own salary and bonus. This evidence was not insignificant – this was the principal witness for the plaintiff corporation; moreover, to allow the jury an unbalanced picture of the relative wealth of the parties only exacerbated the harmfulness of this error.

Additionally, on July 19, 2001, Collins made a motion for summary judgment requesting that the Court rule as a matter of law that Collins' Coin Machine and Lease Agreement was a lease of space as opposed to a lease of machines. By this request, Collins sought to avoid a specific breach of the Distributorship Agreement. On July 23, 2001, this Court denied Collins' motion for summary judgment on grounds that there were genuine issues of fact yet to be determined. By way of this ruling, the purpose, meaning, and intent of the parties with regard to the Coin Machine and Lease Agreement became a factual issue for the jury's determination. This allowed Collins' counsel to present evidence and argue to the jury that the Coin Machine and Lease Agreement was nothing more than a lease of space and therefore not a breach of the Distributorship Agreement. Subsequently, the Court denied IGT's motion to apply judicial estoppel against Collins by ruling that the Coin Machine and Lease Agreement was an issue of law, *not* a matter of fact to be determined [by] the jury.

Another example of a significant error with regard to evidence and the examination of witnesses was the [C]ourt's requirement that cross-examination of Collins' expert Woodside regarding the impact of Collins['] separate contract with

WMS be asked in hypothetical format as if the WMS contract did not exist or were unproven, when in fact, the WMS contract had previously been admitted into evidence without objection. Likewise, documentary evidence of Collins' purchases of WMS and other machines were in the record without objection and without contradiction. To further compound this error, the Court instructed the jury that hypothetical questions were not evidence and should not be considered. Again, this evidence was quite harmful – this was Collins' expert on damages who offered opinions as to the alleged financial harm done to Collins by acts of IGT.

The Court's failure to grant IGT's motion for directed verdict with regards to Collins' cause of action for breach of contract accompanied by fraudulent acts allowed the submission of highly prejudicial evidence to be submitted to the jury. This evidence was the introduction of testimony and documents attempting to show a scheme on behalf of IGT in taking back distributorships throughout North America. Only [sic] July 19, 2001, IGT made a motion in liminie [sic] to exclude any evidence or reference to such a scheme. The Court adopted Collins' argument that such evidence was relevant to the cause of action for breach of contract accompanied by fraudulent acts and unfair competition. Failure of the Court to grant IGT's motion for directed verdict as to *both* causes of action allowed Collins to introduce evidence that was highly prejudicial, not relevant, and used to illicit prejudice, passion, and caprice from the jury.

The court's rulings denied IGT a fair trial; accordingly, a new trial should be granted.

16) Collins Suffered No Damages

In addition to the above arguments, the jury verdict for damages is wholly unsupported and contrary to the greater weight of the evidence for the following reasons:

1. In order to support Collins' theory on damages, Collins was required to breach another exclusive Distributorship Agreement (WMS Agreement).

2. Collins took the position that the Distributorship Agreement only controlled and restricted the sale of competitors' products. However, Collins introduced damages for both its routes operations and sales operations.

3. Collins' damages were based upon a market analysis which included the total Pot[-O-]Gold machines manufactured by Leisure Time and sold to distributors in South Carolina from 1994 through 1998. Collins had the exclusive right to distribute Pot[-O-]Gold machines through 1998 pursuant to an agreement entered into with U.S. Games (Leisure Time) in May of 1992. But for Collins breaching this agreement in October of 1993, Collins would have maintained exclusive rights throughout Dr. Woodside's damage.

4. There is no contractual duty pursuant to the terms of the Distribution Agreement for the Defendant to make, produce or release for sale the product which is competitive with a competitor's products. Collins' damages were based on the Defendant not providing an equivalent product to that of the Pot[-O-]Gold. There was no modification to the standard product as set forth in the 1991 Distribution Agreement, and therefore, no duty to provide Collins a product which was competitive with another manufacturer's product.

5. Prior to the expiration of the Distributorship Agreement, Collins moved before the Court for specific forms of injunctive relief. The Court granted said relief, thereby extending the Distribution Agreement for an additional three years. Despite the extension, Collins did not order a single machine pursuant to the terms set forth in the 1991 Distributorship Agreement.

17) Court's [O]ther Rulings Denied IGT Fair Trial

IGT hereby incorporates any and all of its trial objections and request for rulings. The totality of the record in this case makes it clear that justice has not been done. Errors and manipulation have allowed an unbalanced and unfair presentation to the jury. This [C]ourt should remedy this grave injustice by granting a new trial.

TURNER, PADGET,
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Florence, South Carolina

August 13, 2001

STATE OF SOUTH CAROLINA COUNTY OF HORRY Collins Music Co., Inc., Plaintiff, vs. IGT a/k/a IGT-North America, Defendant.	IN THE COURT OF COMMON PLEAS DOCKET NO: 94-CP-26-3266 **CERTIFICATE OF SERVICE**

This is to certify that copies of the attached Defendant's Motions for Judgment Notwithstanding the Verdict, New Trial and New Trial Remittitur, and Memorandum in Support of Motion were served upon counsel of record this 13th day of August, 2001, by mailing a copy of the same postage prepaid, and addressed as follows:

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Secretary to
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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	DOCKET NO: 94-CP-26-3266
Collins Music Co., Inc., Plaintiff, vs. IGT a/k/a IGT-North America, Defendant.	**MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL AND NEW TRIAL REMITTITUR** (Filed Aug. 13, 2001)

Defendant IGT a/k/a IGT-North America (hereinafter "IGT") hereby moves the Court, pursuant to Rules 50(b) and 59 SCRCP, for an Order granting IGT: (a) a judgment in favor of IGT notwithstanding the verdict as to all causes of action set forth by Plaintiff Collins Music Co., Inc. (hereinafter "Collins") in its Complaint, (b) in the alternative a new trial absolute or remittitur as to all causes of action of Collins, (c) a judgment in favor of IGT notwithstanding the verdict on the issues of Collins['] liability to IGT on each of the causes of action set forth in its Counterclaims, and for a new trial only with regard to the issues of damages recoverable by IGT in each cause of action set forth in its Counterclaims, and/or (d) in the alternative, for a new trial absolute with regard to all of the causes of action set forth in IGT's Counterclaims.

IGT's motion for judgment notwithstanding the verdict under Rule 50(b), SCRCP, is based upon the evidence presented at trial and the grounds previously relied upon in the defendant's motions for directed verdict

at the close of the plaintiff's case and renewed at the close of all evidence.

IGT's motion for a new trial under Rule 59, SCRCP, is based upon grounds that (1) under the thirteenth juror doctrine, the verdict is wholly unsupported and contrary to the greater weight of the evidence presented at trial, (2) the Court erred in the admission and exclusion of evidence as more specifically set forth herein, (3) the Court erred in instructions to the jury to include the inclusion and exclusion of specific charges requested by the parties as more specifically set forth herein, and (4) the verdict in this case was so excessive as to indicate caprice, passion or prejudice on the part of the jury.

IGT alternatively moves this Court for a new trial nisi remittitur with regard to plaintiff's causes of action for breach of contract and breach of contract accompanied by fraudulent acts. This motion is made upon the grounds that the verdict rendered by the jury is so excessive as to indicate caprice, passion or prejudice on the part of the jury and is wholly unsupported and against the greater weight of the evidence presented at trial. Specifically, IGT moves the Court for new trial nisi remittitur in the amount of $2,099,629.00 as further set forth herein.

The above motions are made and based upon the following grounds:

1) Collins' claim of damages for breach of the renewal contingency in the sales order cannot exist; it is barred by the law of this case. Collins elected its' [sic] remedy and made the law of this case.

2) Collins' claim of damages for breach of renewal contingency regarding Collins' exclusive distributorship agreement is barred as a result of Collins'

failure to seek any relief under this Court's Order dated November 17, 1994, granting injunctive relief requested by Collins.

3) The [C]ourt erred in failing to give IGT's requested charge number 25 or the modified version of charge number 25 offered in argument.

4) The only reasonable inference to be drawn from all of the evidence is that Collins could not be and was not ever harmed by an inability to purchase IGT equipment because the court ordered IGT to provide machines to Collins.

5) The [C]ourt erred in failing to rule, as a matter of law, that the integrated Distributorship Agreement imposed no duty to replicate Pot-[O]-Gold Machines.

6) The [C]ourt erred in failing to rule, as a matter of law, that Collins could not recover damages resulting from the alleged breach of a duty that never existed.

7) The [C]ourt erred in failing to rule, as a matter of law, that Collins' defective product claims are limited to any claim that equipment as delivered did not operate as ordered and as designed.

8) The only reasonable inference to be drawn from all of the evidence is that IGT equipment did operate as ordered and as designed.

9) The [C]ourt erred in instructing the jury that the jury could determine contract terms (plaintiff's request #3) when the terms are fully set out in the written agreement.

10) The [C]ourt erred in instructing the jury that the jury could consider the issue of an offer and an

acceptance (plaintiff's request #10) when the contract expressly provides the method and manner for placing orders.

11) The [C]ourt erred in instructing the jury that the plaintiff had a "reasonable time" to give general notice of a breach when the contract expressly provides a ten day window to assert a claim under the manufacturer's limited warranty. ([p]laintiff's request #18[.])

12) The [C]ourt erred in instructing the jury that the jury could consider general code remedies (plaintiff's requests #19 and #21) when the remedy of the limited warranty precludes application of other code remedies.

13) The only reasonable inference to be drawn from all of the evidence is that there is no evidence to support Collins[']claim of breach of contract accompanied by fraudulent act.

14) The Court erred in failing to apply the doctrine of judicial estoppel to bar Collins' claims and defenses.

15) The Court erred in failing to apply the doctrine of judicial admissions to bar Collins' claims and defenses.

16) The Court erred in failing to apply the doctrine of collateral estoppel to bar Collins' claims.

17) The damages awarded by the jury are inconsistent with the plaintiff's defensive position that the Distributorship Agreement does not apply to route operations.

18) The trial court erred in refusing to allow the admission (into evidence) or publication (to the jury) of Collins' pleadings.

19) The only reasonable inference to be drawn from all of the evidence is that Collins' damages, if any, were proximately caused by Collins' own acts and not the acts of IGT.

20) The [C]ourt erred in failing to rule, as a matter of law, that Collins' claimed damages were barred by public policy.

21) The [C]ourt erred in ruling that there was no evidence of public impact from Collins' acts as required by the South Carolina Unfair Trade Practices Act.

22) The [C]ourt erred in refusing to allow a complete cross-examination of Fred Collins including his personal financial information relevant to his credibility.

23) The [C]ourt erred in requiring that cross-examination of Collins' expert Woodside, regarding the impact of Collins['] separate contract with WMS, be asked in hypothetical format.

24) The [C]ourt erred in instructing the jury that these hypothetical questions were not evidence and should not be considered.

25) The only reasonable inference to be drawn from all of the evidence is that the verdict of the jury is contrary to the weight or fair preponderance of the evidence as a matter of fact and law, and the Court should grant a new trial under the "thirteenth juror" doctrine.

26) The only reasonable 'inference to be drawn from all of the evidence is that the verdict of the jury is so excessive under the evidence as to indicate the presence of caprice, passion or prejudice on the part of the jury.

27) IGT hereby incorporates any and all of its trial objections and requests for rulings. The cumulative effects of the Court's errors and the totality of the record in this case makes it clear that IGT was substantially prejudiced thereby, and justice has not been done.

28) The Court erred in directing a verdict on IGT's statutory cause of action for unfair competition and unfair trade practices against Collins.

The above motions and the grounds therefor are supported by the evidence and record in this case and the memorandum of law submitted herewith, and such other matters as may be considered by the Court.

TURNER, PADGET, GRAHAM
& LANEY, P.A.

By: /s/ Wilson S. Sheldon
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ATTORNEYS FOR DEFENDANT

Florence, South Carolina

August 13, 2001

EXHIBIT C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
Collins Music Co., Inc., Plaintiff,	)	CASE NO. 94-CP-26-3266
vs.	)	ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT N.O.V., NEW TRIAL, AND NEW TRIAL NISI REMITTITUR
IGT a/k/a IGT-North America, Defendant.	)	

Defendant IGT moves for a judgment notwithstanding the jury's verdict of August 2, 2001. In the alternative, it moves for a new trial, or in the alternative, it moves for a new trial nisi in the amount of $2,099,629.00.

After carefully reviewing the matter, I conclude that the motions should be denied.

As to IGT's motion for a new trial under Rule 59, SCRCP, all issues properly were addressed at trial.

As to IGT's motion for a judgment notwithstanding the verdict under Rule 50, SCRCP, I conclude that there is sufficient evidence to sustain the jury's verdict.

As to IGT's motion for a new trial nisi remittitur, I conclude that the damages awarded by the jury are within the range of damages shown by the evidence. Accordingly,

IT IS HEREBY ORDERED THAT Defendant IGT's motions for judgment notwithstanding the verdict, new

trial, or in the alternative, new trial nisi remittitur be denied.

AND IT IS SO ORDERED.

/s/ John L. Breeden, Jr.
John L. Breeden, Jr.,
Presiding Judge
Fifteenth Judicial Circuit

Conway, South Carolina
Dated: August 29, 2001

EXHIBIT D

STATE OF SOUTH CAROLINA COUNTY OF HORRY Collins Music Co., Inc., Plaintiff, vs. IGT a/k/a IGT-North America, Defendant.	IN THE COURT OF COMMON PLEAS DOCKET NO: 94-CP-26-3266 **MOTION TO ALTER OR AMEND JUDGMENT**

TO: JAMES B. VAN OSDELL, ESQUIRE; JAMES R. GILREATH, ESQUIRE; SCOTT M. MONGILLO, ESQUIRE:

You will please take notice that within ten (10) days or as soon thereafter as counsel for the Defendant may be heard, the Defendant will move before the Court to Alter or Amend its Judgment pursuant to Rule 59(e) of the

South Carolina Rules of Civil Procedure. The Defendant requests that the Court make specific rulings, and the basis therefore, as to each ground raised in Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial and New Trial Remittitur filed August 13, 2001 with the Clerk of Court for Horry County; specifically:

1) Collins' claim of damages for breach of the renewal contingency in the sales order cannot exist; it is barred by the law of *this* case. Collins elected its' [sic] remedy and made the law of this case.

2) Collins' claim of damages for breach of renewal contingency regarding Collins' exclusive distributorship agreement is barred as a result of Collins' failure to seek any relief under this Court's Order dated November 17, 1994, granting injunctive relief requested by Collins.

3) The [C]ourt erred in failing to give IGT's requested charge number 25 or the modified version of charge number 25 offered in argument.

4) The only reasonable inference to be drawn from all of the evidence is that Collins could not be and was not ever harmed by an inability to purchase IGT equipment because the court ordered IGT to provide machines to Collins.

5) The [C]ourt erred in failing to rule, as a matter of law, that the integrated Distributorship Agreement imposed no duty to replicate Pot-[O]-Gold Machines.

6) The [C]ourt erred in failing to rule, as a matter of law, that Collins could not recover damages resulting from the alleged breach of a duty that never existed.

7) The [C]ourt erred in failing to rule, as a matter of law, that Collins' defective product claims are limited to any claim that equipment as delivered did not operate as ordered and as designed.

8) The only reasonable inference to be drawn from all of the evidence is that IGT equipment did operate as ordered and as designed.

9) The [C]ourt erred in instructing the jury that the jury could determine contract terms (plaintiff's request #3) when the terms are fully set out in the written agreement.

10) The [C]ourt erred in instructing the jury that the jury could consider the issue of an offer and an acceptance (plaintiff's request #10) when the contract expressly provides the method and manner for placing orders.

11) The [C]ourt erred in instructing the jury that the plaintiff had a "reasonable time" to give general notice of a breach when the contract expressly provides a ten day window to assert a claim under the manufacturer's limited warranty. ([p]laintiff's request #18[.])

12) The [C]ourt erred in instructing the jury that the jury could consider general code remedies (plaintiff's requests #19 and #21) when the remedy of the limited warranty precludes application of other code remedies.

13) The only reasonable inference to be drawn from all of the evidence is that there is no evidence to support Collins[']' claim of breach of contract accompanied by fraudulent act.

14) The Court erred in failing to apply the doctrine of judicial estoppel to bar Collins' claims and defenses.

15) The Court erred in failing to apply the doctrine of judicial admissions to bar Collins' claims and defenses.

16) The Court erred in failing to apply the doctrine of collateral estoppel to bar Collins' claims.

17) The damages awarded by the jury are inconsistent with the plaintiff's defensive position that the Distributorship Agreement does not apply to route operations.

18) The trial court erred in refusing to allow the admission (into evidence) or publication (to the jury) of Collins' pleadings, as more fully detailed in paragraph eight of the Memorandum in Support of Defendant's Motions.

19) The only reasonable inference to be drawn from all of the evidence is that Collins' damages, if any, were proximately caused by Collins' own acts and not the acts of IGT.

20) The [C]ourt erred in failing to rule, as a matter of law, that Collins' claimed damages were barred by public policy.

21) The [C]ourt erred in ruling that there was no evidence of public impact from Collins' acts as required by the South Carolina Unfair Trade Practices Act.

22) The [C]ourt erred in refusing to allow a complete cross-examination of Fred Collins including his personal financial information relevant to his credibility.

23) The [C]ourt erred in requiring that cross-examination of Collins' expert Woodside, regarding the impact of Collins[']s separate contract with WMS, be asked in hypothetical format.

24) The [C]ourt erred in instructing the jury that these hypothetical questions were not evidence and should not be considered.

25) The only reasonable inference to be drawn from all of the evidence is that the verdict of the jury is contrary to the weight or fair preponderance of the evidence as a matter of fact and law, and the Court should grant a new trial under the "thirteenth juror" doctrine.

26) The only reasonable inference to be drawn from all of the evidence is that the verdict of the jury is so excessive under the evidence as to indicate the presence of caprice, passion or prejudice on the part of the jury.

27) IGT hereby incorporates any and all of its trial objections and requests for rulings. The cumulative effects of the Court's errors and the totality of the record in this case makes it clear that IGT was substantially prejudiced thereby, and justice has not been done.

28) The Court erred in directing a verdict on IGT's statutory cause of action for unfair competition and unfair trade practices against Collins

In support of this Motion, the Defendant incorporates and craves reference to its Memorandum in Support of Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial and New Trial Remittitur; South Carolina law; and the South Carolina Rules of Civil Procedure.

Florence, South Carolina
September 12, 2001.

TURNER, PADGET, GRAHAM & LANEY, P.A.

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ATTORNEYS FOR DEFENDANT IGT

The South Carolina Court of Appeals

Collins Music Co., Inc., Respondent,

v.

IGT a/k/a IGT North-America, Appellant.

The Honorable John L. Breeden
Horry County
Trial Court Case No. 1994-CP-26-03266

ORDER

Petitioner IGT moves this Court for relief following denial of a petition for writ of certiorari from the South Carolina Supreme Court.

We have considered the petition for rehearing previously filed, as requested by the petitioner. We find no grounds for granting the petition for rehearing. Therefore, the petition for rehearing is denied.

The petition for certiorari already having been denied, the Court shall send the remittitur. IT IS SO ORDERED.

/s/ Jasper M. Cureton, J.

/s/ Carol Connor, J.

/s/ Ralph King Anderson, Jr., J.

Columbia, South Carolina
May 12, 2003

cc: James F. Flanagan, Esquire
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Ronald E. Boston, Esquire
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[LOGO]

The South Carolina Court of Appeals

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MEMORANDUM

TO: Daniel Shearouse
Clerk, Supreme Court

FROM: Kenneth A. Richstad
Clerk, Court of Appeals

RE: Collins Music Co., Inc. v. IGT
Case #200122041

DATE: October 23, 2002

The Court has asked me to request certification of this case.

Pursuant to a motion to dismiss, a panel of this Court dismissed the appeal on the ground that a second post-trial motion had not tolled the time to serve the notice of appeal.

The appellant has filed petition for rehearing, rehearing *en banc*, or reinstatement and certification.

Four of the Court of Appeals judges are recused in this matter. Thus, the court cannot convene a quorum to consider the *en banc* request.

In view of these disqualifications and the significance of the issue in South Carolina trial and appellate procedural law, the Court of Appeals asks the Supreme Court to certify this case.

The complete file is attached.

The Supreme Court of South Carolina

Collins Music Co., Inc. Respondent,

v.

IGT a/k/a IGT-North America, Appellant.

ORDER

Pursuant to Rule 204(b), SCACR, this appeal is hereby certified for review by this court.

IT IS SO ORDERED.

/s/ Jean Hoefer Toal C.J.
FOR THE COURT

Columbia, South Carolina

November 15, 2002

The Supreme Court of South Carolina

Collins Music Co., Inc. Respondent,

v.

IGT a/k/a IGT[-]North[ ]America, Appellant.

ORDER

This appeal is currently before the Court in the posture of a petition for rehearing *en banc* from an order issued by a panel of the Court of Appeals dismissing the appeal as untimely. The Court of Appeals was unable to convene a quorum to consider the *en banc* request because four of its judges are recused in this matter. Accordingly, it asked that the case be certified by this Court. The Court of Appeals took no action on the petition for rehearing and the case was certified to this Court by order of the Chief Justice dated November 15, 2002.

Due to the inability of the Court of Appeals to convene a quorum to entertain the petition for rehearing *en banc*, the petition is hereby regarded as denied. Appellant shall have thirty days from the date of this order to serve and file a petition for a writ of certiorari pursuant to Rule 226, SCACR. This will give the parties an opportunity to engage in the normal procedures employed in seeking review by this Court of a Court of Appeals decision. This is the procedure that shall be followed in the rare event this situation arises again.

IT IS SO ORDERED.

/s/ Jean Hoefer Toal C.J.
/s/ James E. Moore J.
/s/ John H. Waller, Jr. J.
/s/ E.C. Burnett III J.
/s/ Costa M. Pleicones J.

Columbia, South Carolina

January 10, 2003

[LOGO]

The South Carolina Court of Appeals

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January 27, 2003

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RE: Collins Music Co., Inc. v. IGT

Dear Mr. Boston:

This letter confirms our telephone conversation of today. You asked about any disqualifications of the original panel members (Judges Goolsby, Connor, and Anderson) who issued this court's order.

After conferring with Mr. Richstad, I can inform you that Judge Goolsby became disqualified after the panel order was issued.

By copy of this letter, I am advising all counsel of record of this information.

Very truly yours,
/s/ V. Claire Allen
DEPUTY CLERK

cc: James F. Flanagan, Esquire
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Wilson S. Sheldon, Esquire
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George M. Hearn, Jr., Esquire
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James R. Gilreath, Esquire
Scott Michael Mongillo, Esquire,
Hon. Daniel E. Shearouse, Clerk of the
South Carolina Supreme Court

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

John L. Breeden, Jr., Circuit Court Judge

Opinion No. 2002-OR-405 (S.C. Ct. App. filed September 4, 2002)

Collins Music Co., Inc., Respondent,

v.

IGT a/k/a IGT-North America, Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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INDEX

Certificate of Counsel 4

Questions Presented 5

Statement of the Case 5

Arguments

1. THE COURT OF APPEALS DISREGARDED PRIOR ERROR PRESERVATION LAW BY HOLDING THAT A TRIAL JUDGE'S IMPLICIT RULING PRESERVES ISSUES FOR APPEAL 7

2. THE COURT OF APPEALS IMPROPERLY APPLIED THE FACT-SPECIFIC HOLDING IN *QUALITY TRAILER* TO THIS CASE 13

3. A MOTION BROUGHT UNDER RULE 59(e), SCRCP, WHICH SEEKS ONLY 59(e) RELIEF AND ARGUABLY RAISES UNPRESERVED ISSUES TO THE TRIAL COURT IS SUFFICIENT TO TOLL THE TIME FOR APPEAL 16

4. THERE ARE SPECIAL AND COMPELLING REASONS FOR THIS COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI 18

Conclusion 21

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that a Petition for Rehearing, for Rehearing *en banc*, and, alternatively, for Reinstatement and Certification to this Court was timely made before the South Carolina Court of Appeals. However, four of the Court of Appeals' judges, including one member of the three-judge panel that issued the decision,

recused themselves in the matter. The three-judge panel was therefore unable to convene a quorum to consider the rehearing and reinstatement requests, and the Court of Appeals was unable to convene a quorum to consider the *en banc* rehearing request. On October 23, 2002, a memorandum from Kenneth A. Richstad to Daniel Shearouse conveyed the Court of Appeals' request that the appeal be certified for review by this Court because of "these disqualifications and the significance of the issue in South Carolina trial and appellate procedural law. . . . " (App. p. 328).

On November 15, 2002, the Chief Justice issued an Order For The Court certifying the case for its review pursuant to Rule 204(b), SCACR. (App. p. 329). Subsequently, on January 10, 2003, this Court issued its Order deeming the request for an *en banc* hearing denied in view of the unusual posture of the matter when it was certified by this Court.

Until receipt of the letter from the Deputy Clerk of the Court of Appeals on January 28, 2003, Petitioner was not aware that one of the four Court of Appeals' judges disqualified in this matter was also a member of the panel that issued the decision. (App. p. 332). This is a circumstance of which this Court also was apparently unaware when it issued its Order of January 10, 2003, in which it deemed denied only the *en banc* rehearing request. (App. p. 330). This Court did not specifically address and Petitioner is uncertain of the status of Petitioner's request for a rehearing by the three-judge panel.

Petitioner has been directed by this Court to file a petition for writ of certiorari and therefore has assumed for purposes of this Petition that its rehearing request

would be similarly treated and also deemed denied by this Court. Petitioner asks the Court not to lose sight of the fact that, substantively, Petitioner has been provided no rehearing or review of any kind of the Court of Appeals' decision.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding, contrary to all error preservation precedent, that a trial judge's implicit ruling on issues in a post-trial order preserved those issues for appellate review?

2. Did the Court of Appeals err in its broad application of the fact specific holding of this Court in *Quality Trailer*[1] to dismiss [P]etitioner's appeal when the facts here are not comparable to those of *Quality Trailer* and do not support such broad application?

3. Did the Court of Appeals err in holding [P]etitioner's motion, brought under Rule 59(e), SCRCP, which raised issues at least arguably not ruled on by the trial judge and only sought 59(e) relief, was not sufficient for the purpose of tolling the time for filing a notice of appeal?

4. Do special and compelling reasons exist for this Court to grant the Petition for Writ of Certiorari?

---

[1] *Quality Trailer Products, Inc. v. CSL Eqpt. Co., Inc. and I. Corp.*, 349 S.C. 216, 562 S.E.2d 615 (2002).

STATEMENT OF THE CASE

This action was brought by Respondent (hereinafter "Collins") based upon a video gaming machine distributorship agreement between Petitioner (hereinafter "IGT") and Collins. In response to Collins' allegations IGT pled several counterclaims. The trial concluded on August 3, 2001 with a verdict in Collins' favor for $15,000,000. On August 13, 2001, IGT filed a motion for Judgment Notwithstanding the Verdict, New Trial, and New Trial *Nisi Remittitur* pursuant to Rules 50(b) and 59(a), SCRCP. [hereinafter "post-trial motions"]. (App. p. 146).

One post-trial motion requested that the trial judge grant IGT a JNOV under Rule 50, SCRCP, upon the grounds raised in IGT's motions for directed verdict. The other requested a new trial under Rule 59(a), SCRCP, based upon the thirteenth juror doctrine and upon errors on evidentiary rulings and jury charge instructions. Alternatively, IGT moved for a new trial nisi remittitur, specifically requesting the judge to remit the verdict to $2,099,629. Each of these components of the post-trial motions were supported by twenty-eight separate grounds.

Without oral argument, the trial judge issued a one-page order on August 29, 2001 denying IGT's motions for the following reasons. (App. p. 170). In denying the motion for a new trial, the order stated, "as to IGT's motion for new trial under Rule 59, SCRCP, all issues were properly addressed at trial." In denying IGT's motions for JNOV, the order stated, "I conclude that there is sufficient evidence to sustain the jury's verdict." Finally, in denying IGT's nisi remittitur motion, the order stated, "the damages awarded by the jury are within the range of damage shown by the evidence."

On September 13, 2001, IGT's counsel filed a motion pursuant to Rule 59(e), SCRCP. (App. p. 171). The motion was filed for two major reasons. First, IGT's counsel was concerned with the body of South Carolina error preservation law requiring a trial judge to rule, and moreover *explicitly* rule, on each issue raised in a post-trial motion. A detailed discussion of this law follows. Second, IGT's counsel was convinced that the order had not ruled on several issues *at all*, and had not ruled with sufficient explicitness on *any issue* to preserve the issues for appellate review. The 59(e) motion requested only that the trial judge make "specific rulings, and the basis therefore, as to each ground raised in defendant's [post-trial motions]." This motion ensured that even if the trial judge still failed to consider and explicitly rule on each issue, the issues would nevertheless be preserved for appellate review.

IGT's counsel had concluded from the post-trial order that the trial judge was not going to grant any relief sought by IGT, and as expected, the trial judge denied the 59(e) motion in another one page order dated October 29, 2001 – again failing to explicitly rule on any of IGT's issues. (App. p. 176). Accordingly, on November 21, 2001, IGT timely filed and served its notice of appeal. (App. p. 1). IGT served and filed its initial brief on April 9, 2002, addressing several significant errors at trial which IGT believes will require a new trial or judgment in its favor.[2] (App. p. 10-85).

---

[2] The Court of Appeals, by order dated, April 5, 2002, granted IGT's request to exceed the fifty-page limit. (App. p. 6).

On May 20, 2001, (four days after this Court's denial of a petition for rehearing in *Quality Trailer* on May 16, 2002) Collins filed a motion to dismiss IGT's appeal. (App. p. 88). The Court of Appeals granted the motion by order dated September 4, 2002. *Collins Music Co. v. IGT*, Op. No. 2002-OR-405 (S.C. CT. App. filed September 4, 2002). (App. p. 244). IGT timely filed a petition for rehearing, petition for rehearing *en banc*, and alternatively for certification. (App. p. 252). Pursuant to this Court's instruction in its January 10, 2003 order (App. p. 330), IGT now seeks a writ of certiorari to review the decision of the Court of Appeals dated September 4, 2002.

ARGUMENT

1. THE COURT OF APPEALS DISREGARDED PRIOR ERROR PRESERVATION LAW BY HOLDING THAT A TRIAL JUDGE'S IMPLICIT RULING PRESERVES ISSUES FOR APPEAL

The trial judge's initial order denying IGT's post-trial motions raised several concerns about error preservation. These concerns, and the misconstruction of error preservation law by the Court of Appeals has ramifications not only for IGT, but for the trial bar or any party with a case currently on appeal or in the post-trial stage. Primarily, there is confusion about what action a party must take to preserve error when there are ambiguities in the trial judge's order denying post-trial motions. Also, a party now faced with a post-trial order which is inexplicit is placed in a "catch-22". If a 59(e) motion is made, the Court of Appeals may disagree about its necessity and hold the party outside the time for filing its appeal. Conversely, if the motion is not made, the Court of Appeals may disagree with that decision and hold that issues were not properly

preserved. By placing parties in this dilemma, the Court of Appeals disregards a line of South Carolina cases requiring parties to ask a trial judge to explicitly rule on issues not clearly addressed in a post-trial order.

Case law is replete with admonitions from this Court that, above all other appellate practice rules, preservation of issues for appeal is paramount. In *Kennedy v. The S.C. Retirement System,* 349 S.C. 531, 564 S.E.2d 322 (2001), this Court stated, "We reiterate this Court's longstanding principle of error preservation. 'Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plan error rule.'" (Quoting Hon. Jean H. Toal, et al., *Appellate Practice in South Carolina* 65 (1999)).

There are many instances where both this Court and the Court of Appeals have refused to hear issues not properly preserved by a Rule 59(e) motion. As noted by Chief Justice Toal, "[W]here a party raises an issue, the trial court fails to rule upon the issue, and the party fails to raise the court's omission by way of a rule 59 motion, the issue is not ruled upon and, therefore, not preserved on appeal. . . . When an order is internally inconsistent, that inconsistency must be raised to the trial court by way of a post-trial motion before it is preserved for appellate review. . . . A post trial motion must also be made where there are *errors or inconsistencies* in the trial court's final order." (Hon. Jean H. Toal, et al[.], *Appellate Practice in South Carolina,* 59 (2d ed. 2002) citing *Great Game, Inc. v. S. C. Dept. of Revenue*, 339 S.C. 79, 529 S.E.2d 6 (2000); *Parker v. Shecut*, 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000), *reversed on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002); *Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995)).

Our appellate courts have also held that 59(e) motions are required to preserve for appeal any issue not explicitly ruled upon. (*See I'On L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 526 S.E.2d 716 (2000); *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *Pelican Bldg. Ctrs. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993); *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991); *Shealy v. Aiken Co.*, 341 S.C. 448, 535 S.E.2d 438 (1991); *Trivelas v. S.C. D.O.T.*, 348 S.C. 124, 558 S.E.2d 271 (Ct. App. 2001); *Vespazianni v. McAlister*, 301 S.C. 411, 415 S.E.2d 427 (Ct. App. 1992) et al[.]). In *Noisette*, *id.*, a case cited in over thirty-five error preservation decisions, this Court held that although the trial judge ruled on an issue (whether the defendant was an "insured" under an insurance policy), his ruling was not explicit as to whether the defendant was a "permissive user". Although the only way the defendant could have been an insured was as a permissive user, because the appellant failed to seek an explicit ruling with a 59(e) motion, this Court would not consider the issue on appeal.

Here, IGT made a reasonable determination that the trial judge's order did not explicitly rule on nearly all of the twenty-eight grounds contained in its post-trial motions. For instance, by denying *all* new trial motions because, "all issues [were] properly addressed at trial", the trial judge clearly failed to rule on or even allude to IGT's motion for new trial under the thirteenth juror doctrine, made for the first time *after* trial. Also, the order only dealt with Collins' claims, and failed to mention the issues addressing IGT's counterclaims, to which at least twenty

of the twenty-eight grounds pertained.[3] Additionally, by using the "sufficiency of the evidence" basis to deny *all* JNOV issues (which included both rulings of law by the judge at trial and sufficiency of evidence for the jury), it was at least unclear whether the judge had considered the JNOV grounds that were purely on issues of law.[4] IGT's response to the post-trial order, guided by *Noisette* and the litany of similar cases directing dire consequences in the alternative, was to file a 59(e) motion requesting the judge to specifically rule and state the basis as to each issue raised.

Here, the Court of Appeals held that the explicit ruling requirement is inapplicable in jury cases because a trial judge is not required to make findings of fact and law in jury cases. The Court of Appeals stated, "the requirement imposed upon the court by Rule 52(a), SCRCP, . . . is limited to cases tried without a jury or with an advisory jury and is inapplicable here." *Collins v. IGT* at 7 (2002). This view is wrong and confuses *two separate obligations*: the obligation of a party to present unresolved issues to the trial court for a ruling (in both jury and non-jury matters) and the obligation of a trial judge to make specific findings of fact and conclusions of law when required by Rule 52(a).

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[3] See grounds 3, 4, 5, 8, 9, 10, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27, and 28 in IGT's post-trial motions. (App. p. 147-150).

[4] See grounds 14, 15, 16, 17, 18, 24, 27, and 28 of IGT's post-trial motions. This ruling was also confusing because the judge addressed the issues as matters of law at trial. However, in the order, all JNOV issues were addressed as evidentiary matters – causing IGT to question whether the judge intended to change the basis of his rulings or simply did not rule on those issues at all.

A major flaw of the Court of Appeals' view is its lack of support by any authority. Even the Court of Appeal's stated basis for its holding – Rule 52 – makes no mention of an "explicit ruling requirement" in any case – jury or non-jury. In fact, as this Court held in *Noisette*, a party's obligation to seek an explicit ruling on all issues is totally unrelated to Rule 52. However, the Court of Appeals ignores this authority.

There is a [sic] another crucial flaw in the Court of Appeal's analysis. If the obligation to rule explicitly is tied only to a trial judge's obligation to make findings of fact and law, 59(e) motions would be unnecessary to preserve issues not explicitly ruled on when such findings are not required. It would also follow under this analysis that a 59(e) motion would never be required or appropriate after a jury trial. This, however, is not the law in South Carolina.

For instance, Rule 52(a) specifically makes findings of fact and law unnecessary in orders addressing summary judgment ("findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 . . .", Rule 52(a), SCRCP). However, despite this clear exemption, this [C]ourt and the Court of Appeals have repeatedly required 59(e) motions to preserve for review issues only implicitly ruled upon in summary judgment motions. (*See Summer v. Carpenter, id.*; *Trivelas v. S.C. D.O.T., id.*, et al[.]). For example, in *Walker v. The Bluffs Apartments*, 324 S.C. 350, 477 S.E.2d 472 (Ct. App. 1995), one of the appellant's arguments raised to the trial judge on motion for summary judgment was the common knowledge exception to the need for expert testimony. The judge found the expert's affidavit insufficient and granted

summary judgment without specifically ruling on the "common knowledge" issue. On appeal, the Court of Appeals refused to hear the issue, stating:

> We need not address this argument because *it is not properly before the court.* The record shows that Walker argued the common knowledge exception to Narmour's motion for summary judgment. The trial court ruled that Walker's expert was not qualified, but *did not* ***explicitly*** *rule* on Walker's argument for application of the common knowledge exception. (emphasis added)

The Court of Appeals' legal misconstruction of the explicit ruling requirement in IGT's case totally contradicts its decision in *Walker*. Furthermore, in *Walker* the Court of Appeals failed to mention Rule 52(a), and instead required an explicit ruling even though the trial judge was not required to make findings of fact or law.

Even further proof of the Court of Appeal's error is found in *Payton v. Kearse*, 319 S.C. 188, 460 S.E.2d 233 (Ct. App. 1995) (rev. on other grounds), a jury trial, where the Court of Appeals refused to hear an issue not properly addressed by the trial court, and not preserved by a 59(e) motion. The Court of Appeals held that although the issue on appeal (new trial based upon juror disqualification) was clearly raised to the trial judge, and the judge clearly denied the relief sought (new trial), the issue was not preserved because the order failed to specifically address it, and no 59(e) motion was made. However, although the trial court's post-trial order here did not explicitly address any of IGT's issues, the Court of Appeals ignored this omission. Moreover, the Court punished IGT for making a 59(e) motion – a motion it required the appellant in *Payton* to make.

No decision of this Court has changed the precedent of *Payton* or *Walker*. Also, not one case in South Carolina has ever held that the explicit ruling obligation of a trial judge does not apply to jury cases. In fact, case law actually requires 59(e) motions for inexplicit rulings in both jury trials and cases where Rule 52(a) requirements are not applicable. *Payton* even required a 59(e) motion where there was no doubt that the judge denied the relief sought in the post-trial motion. IGT had a reasonably based belief that the order denying its post-trial motions was not sufficiently explicit to preserve all issues for appeal and appropriately filed its 59(e) motion.

2. THE COURT OF APPEALS IMPROPERLY APPLIED THE FACT-SPECIFIC HOLDING IN *QUALITY TRAILER* TO THIS CASE.

The Court of Appeals makes two crucial errors of fact in applying *Quality Trailer* as the basis for its decision here. First, it treats IGT's 59(e) motion as identical to that of I. Corp.'s (the appellant in *Quality Trailer*) without any reference to the details of the *Quality Trailer* motion and thus, without any comparison of the specific relief sought by I. Corp. and IGT in their respective motions. Second, the Court of Appeals incorrectly defined IGT's 59(e) motion by its inclusion of the same grounds found in its post-trial motions.

Addressing the first error, unlike this Court in *Quality Trailer*, the Court of Appeals makes no comparison of the relief IGT sought in its post-trial motions with the relief sought in its 59(e) motion. In fact, reading the dismissal order without more leads the reader to the erroneous impression that IGT's 59(e) motion requested JNOV and new trial relief, not, as actually requested,

specific or explicit rulings. The entire premise of this Court's decision in *Quality Trailer* turned on its comparison of the relief sought in I. Corp.'s post-trial motions with that sought in its motion captioned under 59(e). This Court, pointing out that both motions sought identical relief (JNOV and new trial), concluded that the second motion was factually a successive JNOV and new trial motion, not a 59(e) motion as captioned.

Even the most cursory review of the two I. Corp. motions clearly validates this Court's decision in *Quality Trailer*. In its JNOV motion, I. Corp. prayed for the following:

> . . . [I. Corp.] ***respectfully prays to have the jury verdict and judgment of $86,314.53 in favor of Plaintiff, set aside and to have judgment entered in accordance with I. Corp[.]'s Motion*** for Directed Verdict ***and in support thereof states***: . . . (emphasis added.)[5] (App. p. 179).

In its second motion, captioned "59(e)", I. Corp. prayed for the exact relief sought in its initial motion. In almost a word-for-word duplication of the post-trial motions, the second motion's [sic] prayed as follows:

> . . . [I. Corp.] ***respectfully prays to have the jury verdict and judgment of $86,314.53 in favor of Plaintiff, set aside and to have judgment entered in accordance with I. Corp[.]'s Motion*** for Judgment Notwithstanding

[5] In a separate post-trial motion, I. Corp. prayed for a new trial on the same grounds as contained in its JNOV motion. (App. p. 194).

> the Verdict and ***with I. Corp[.]'s Motion for Directed Verdict*** or in the alternative prays for a new trial in accordance with I. Corp[.]'s Motion for New Trial ***and in support thereof states***: . . . (emphasis added.) (App. p. 205).

A comparison of these motions with IGT's corresponding motions clearly shows that IGT did not seek the same relief twice. IGT's post-trial motions for JNOV, new trial, and new trial nisi remittitur, requested the following relief:

> . . . IGT hereby moves the Court . . . for an Order granting IGT: (a) a judgment in favor of IGT notwithstanding the verdict [for Collins' causes of action] . . . (b) in the alternative a new trial absolute or remittitur to all causes of action of Collins, (c) a judgment in favor of IGT notwithstanding the verdict [on IGT's counterclaims] . . . (d) in the alternative, for a new trial absolute with regard to all of the causes of action set forth in IGT's Counterclaims. (App. p. 146).

Following the trial judge's one-page order denying these motions, the relief IGT sought in its 59(e) motion is entirely different from its post-trial motions. There, IGT only requested the following relief:

> The Defendant requests that the Court make specific rulings, and the basis therefore, as to each ground raised in Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial and New Trial Remittitur filed August 13, 2001 with the Clerk of Court for Horry County. (App. p. 171).

Unlike I. Corp.'s prayer for identical relief in its post-trial and 59(e) motions, *not one word* of the relief IGT

sought in its 59(e) motion mirrored its post-trial motions. IGT asked only for the relief allowed by a 59(e) motion – specific rulings.

Compounding the first error, the Court of Appeals reached its decision by also noting that IGT included in its 59(e) motion the same grounds found in its post-trial motions, and on that basis defined IGT's 59(e) motion as a successive JNOV and new trial motion. This conclusion is misplaced. IGT's counsel repeated the grounds in its 59(e) motion only to be certain that each issue, even if not explicitly ruled on in response to the 59(e) motion, would be preserved for appellate review. As Chief Justice Toal advises, "Once an issue has been properly raised by a Rule 59(e) motion, it is preserved, and a second motion is not required if the trial court does not specifically rule on the issue so raised." Hon. Jean H. Toal, et al[.], *Appellate Practice in South Carolina*, 59 (2d ed[.]). The trial judge, presented in IGT's 59(e) motion with a second opportunity to explicitly rule on each ground, failed to do so.

The Court of Appeals defined IGT's 59(e) motion by the inclusion of these grounds and not by the relief they supported. However, motions have always been defined by the actual relief they seek, and never by the grounds supporting it. "The court will construe [the motions], however styled, to be the type proper for the relief requested." *Demers v. Roncor, Inc.*, 1992 U.S. App. LEXIS 14984 (9th Cir. 1992). (emphasis added.)

Unlike IGT, I. Corp. repeated the grounds from its post-trial motion in its "59(e)" motion in order to support a second request for JNOV and new trial relief. Although I. Corp[.] claimed in its petition before this Court that it's [sic] 59(e) motion was made solely for issue preservation purposes,

this Court correctly recognized that I. Corp. asked the trial court to reverse itself and grant the initial motions. This Court's holding in *Quality Trailer* is correct under the facts of that case. However, its holding is not correct under the facts of this case.

These two errors discussed above create an enormous dilemma for and raise profound questions of fairness not only to IGT, but also to the trial bar and all litigants. The Court of Appeals artificially molded IGT's 59(e) motion to fit within the parameters of this Court's decision in *Quality Trailer*. This artificial molding promotes the most severe injustice possible to IGT, dismissal of its appeal of a fifteen-million dollar judgment with no consideration of its merits.

3. A MOTION BROUGHT UNDER RULE 59(e), SCRCP, WHICH SEEKS ONLY 59(e) RELIEF AND ARGUABLY RAISES UNPRESERVED ISSUES TO THE TRIAL COURT IS SUFFICIENT TO TOLL THE TIME FOR APPEAL.

The last sentence of Rule 1, SCRCP, states that the rules are to be construed to achieve just determinations. This statement is consistent with the Rule 8(f), which provides that pleadings should be construed to "do substantial justice." The decision here does not comport with the intent of these rules.

IGT's 59(e) motion raised issues that were arguably unpreserved for appellate review. The Court of Appeals obviously disagreed with IGT's determination. However,

instead of viewing the motion as at least sufficient to toll the time for appeal[6] the Court of Appeals created a new condition by making the tolling provision dependent upon its hindsight determination of a 59(e) motion's necessity. Such a rule is egregiously unfair because it requires parties to clairvoyantly forecast, as through a crystal ball, an appellate court's view of the motion's necessity simply to toll the time for appeal. This is without precedent in any case or rule of court in South Carolina.

Moreover, the Court of Appeals' decision ignores federal precedent on point. The holdings in *Quality Trailer* and *Coward Hund*[7] are limited to situations where a party files successive JNOV/new trial or successive 59(e) motions. In deciding *Coward Hund*, the Court of Appeals looked solely to federal precedent, as no South Carolina authority existed. (citing *Brown v. United Ins. Co. of Am.*, 807 F.2d 1239 (5th Cir. 1987)). In reviewing the standard for "proper" 59(e) motions, the Court of Appeals should have likewise considered federal precedent in determining the sufficiency of the motion for purposes of tolling the time to appeal.

For purposes of tolling the time for appeal, federal courts view motions which even arguably could be 59(e) motions as proper. In *Forrest v. Occidental Petroleum Corp.*, 1990 U.S. App. LEXIS 19292 (9th Cir.), the court stated:

> We have previously liberally interpreted motions for reconsideration as having been filed pursuant

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[6] Rules 203(b)(1), SCACR and 59(f), SCRCP.

[7] 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999).

> to Rule 59(e) in determining whether the time for filing a notice of appeal from the underlying judgment or order has run. . . . "Even if a [59(e)] motion is inartfully drawn or so defective that it could not properly be granted, ***it is still enough to toll the time for appeal.***" (quoting *Sierra-On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415 (9th Cir. 1984). (emphasis added).

Instead of summarily dismissing a party's appeal because the 59(e) motion is not viewed as "necessary" or "proper", federal courts apply two standards of review for 59(e) motions – one standard when addressing the merits of the motion, and a less-strict standard when addressing the tolling effect of the motion. In *Forrest, id.*, the court stated:

> In cases addressing the time for appeal, we have generally found a motion for reconsideration to be within Rule 59(e) if it requests a substantive change in the judgment, *regardless of the grounds upon which it is raised* . . . [Even if a 59(e) motion] raises no new grounds but "simply rehashes arguments heard at trial', [it] may be made under Rule 59(e)." (quoting *Clipper Express v. Rocky Mountain Motor Tariff*, 690 F.2d 1240 (9th Cir. 1982)). (emphasis added).

The court further explained that, "On the other hand, when reviewing the merits of an order granting or denying a 59(e) motion, we apply a stricter standard." *Forrest* at 17.

Other federal cases follow the same principle. (*See Barnett v. Cross*, 893 F.2d 1336 (6th Cir. 1990) and *Cloud v. Summers*, 110 F.3d 67 (9th Cir. 1997)). In *Cloud*, the court held, "As we have ruled, if a motion served within ten days of judgment could have been brought under Rule

59(e), the motion tolls the time for appeal even if Rule 59 is not expressly invoked." (emphasis added.)

The basis for dismissal in *Coward Hund* was federal precedent (subsequently adopted by this Court in *Quality Trailer*). Likewise, the Court of Appeals here should have looked to and applied the federal courts' interpretation of 59(e) motions for tolling purposes. Federal courts recognize no judicious purpose in dismissing an appeal for filing a 59(e) motion that a party believes has arguable merit. This principle should be especially applicable where every single case decided at a time a 59(e) motion was filed held that such motions are not only good practice, but are required to preserve issues for appeal. IGT's 59(e) motion was proper on its merits because it raised issues required by error preservation precedent. However, even if the Court of Appeals disagreed, the 59(e) motion, seeking only 59(e) relief, was at least sufficient to toll the time for appeal.

4. THERE ARE SPECIAL AND COMPELLING REASONS FOR THIS COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

There are several important reasons why this Court should grant writ of certiorari in this case. The Court of [Appeals'] decision here adversely impacts not only IGT, but the entire bar, and all other litigants before the appellate and trial courts.

Most importantly, parties now have inconsistent guidance as to how error should be preserved when the trial judge's rulings are reasonably construed to leave some issues unresolved, or fail to make explicit rulings or simply fail to rule on the issues presented. Confusion also

arises because the decision here ignores the body of South Carolina law requiring a 59(e) motion when an order fails to explicitly address some or all issues. The Court of Appeals incorrectly determined that explicit rulings are only needed when Rule 52(a) requires findings of fact and law. The decision actually seems to declare that a 59(e) motion is never appropriate following a jury trial. Precedent from both South Carolina appellate courts holds to the contrary and requires 59(e) motions to preserve inexplicit rulings in jury trials and other situations where Rule 52(a) clearly has no application.

As a result of this new holding by the Court of Appeals, members of the bar are now left in the dark as to when, if ever, they should file a 59(e) motion. The Court of Appeals provides no guidance for that question, except to note that a 59(e) motion should not be used to ask the trial judge to "reconsider" an issue already presented and ruled upon by a post-trial motion. However, the Court of Appeals then follows that advice by noting that, "*The purpose* of Rule 59(e), SCRCP, to alter or amend judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (citing James F. Flanagan, *South Carolina Civil Procedure*, 475 (2d ed. 1996)). (emphasis added.) Obviously, much confusion is created by the Court of Appeals' decision in this case.

Secondly, in addressing IGT's order, the Court of Appeals failed to consider the doubt raised by the trial judge's qualified rulings on IGT's issues – or at least the possibility that the order raised such doubts. Instead, the Court of Appeals artificially molded the facts in this case to inappropriately apply *Quality Trailer*.

The Court of Appeals conditioned the tolling provision of Rule 203(b)(1), SCACR, upon a retrospective determination by an appellate court of the appropriateness and necessity of a 59(e) motion. The Court of Appeals acted without any precedent and ignored federal precedent directly on point. If federal precedent had been applied to IGT's 59(e) motion, as it should have been, the motion would have been at least sufficient to trigger the tolling provision.

Finally, the unusual posture of this case raises serious questions concerning the efficacy of the Court of Appeals' decision. On September 20, 2002, IGT filed a Petition for Rehearing and Petition for Rehearing *En Banc* and Alternatively for Reinstatement and Certification. Until there was a ruling thereon, the Court of Appeals' decision was not final. The subsequent recusal of four members of that court, including one of the original panel members has deprived IGT any review of the decision.

Either a quorum was not convened to issue a "final" decision, or IGT has been substantively denied its right to a rehearing by the original panel and a rehearing *en banc* by the Court of Appeals. This Court has clearly held that the Court of Appeals may take no valid action without a quorum of three judges. In *State v. McMillan*, 349 S.C. 17, 561 S.E.2d 602 (2002), this Court stated, "under S.C. Code Ann. §14-8-80(d), three judges are necessary to constitute a quorum of the Court of Appeals, and a concurrence of the majority is necessary for reversal of the judgment below. This Court has recognized that no valid act can be done in the absence of a quorum." (citing *Care and Treatment of Matthews*, 345 S.C. 638, 550 S.E[.]2d 311 (2001) and *Gaskin v. Jones*, 198 S.C. 508, 18 S.E.2d 454 (1942)).

In *Garris v. The Governing Board of the S.C. Reinsurance Facility*, 333 S.C. 432 (1998), this Court dealt with the issue of lack of quorum on the Reinsurance Facility Board by stating, " . . . the common law rule that a majority of the whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum. [internal citations omitted.] A member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts on the matter." For the same reason, a judge who recuses himself from a panel cannot be considered part of the quorum.

Here, a member of IGT's three-judge panel recused himself prior to the decision becoming final. Accordingly, either the decision lacks efficacy and should be vacated, or this Court should review the decision pursuant to IGT's petition for writ of certiorari. Otherwise, the decision will have had no substantive review by any court.

CONCLUSION

The decision in this case has a broad effect not only on IGT, but on numerous other litigants similarly situated. Currently, there are many cases pending in the appellate and trial courts where 59(e) motions have been filed for the same reason IGT filed its motion. The issue now before this Court concerns subject matter jurisdiction, as it did in *Quality Trailer*. However, the misapplication of that decision exposes appellants to unjust determinations of their appeal. For the aforementioned reasons, IGT respectfully requests that this Court issue a writ of certiorari in this matter, reverse the decision of the Court of Appeals,

and hear this case on its merit pursuant to the Rule 204(b) transfer to this Court. (App. p. 329).

February 7, 2003

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THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

John L. Breeden, Jr., Circuit Court Judge

Opinion No. 2002-OR-405
(S.C. App. filed September 4, 2002)

Collins Music Co., Inc., Respondent.

v.

IGT a/k/a IGT-North America, Petitioner.

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INDEX

Counter-Statement of the Case 4

Counter-Statement of Questions Presented..... 6

Arguments

I. **THE COURT OF APPEALS CORRECTLY RULED THAT IGT'S SUCCESSIVE POST-TRIAL MOTION DID NOT TOLL THE TIME FOR FILING A NOTICE OF APPEAL** 7

II. **THERE IS NO COMPELLING REASON FOR GRANTING CERTIORARI IN THIS CASE** 15

III. **BY INCLUDING ITS BRIEF ON THE MERITS, IGT HAS SOUGHT TO INCORPORATE IMPROPER MATTER IN ITS APPENDIX TO ITS PETITION FOR CERTIORARI** 17

Conclusion 18

COUNTER-STATEMENT OF THE CASE

Collins Music Co., Inc. brought this suit against IGT in 1994, asserting multiple causes of action arising out of a contractual dispute. IGT raised several counterclaims against Collins. Following a nine-day trial, a jury returned a verdict on August 2, 2001, in favor of Collins for fifteen millions dollars.

Thereafter, on August 13, 2001, IGT filed post-trial motions seeking judgment NOV, a new trial, and a new trial *nisi remittitur*. (Exhibit No. 1)[1] Twenty-eight separate

[1] References to exhibits are those contained in Respondent's initial Motion to Dismiss and supporting Memorandum which begins at page 0088 according to the Index to IGT's Appendix to its Petition for Writ of Certiorari.

grounds were asserted in support of the motions. On August 29, 2001, the trial judge issued an order denying all of IGT's post-trial motions (Exhibit No. 2) IGT was served with a copy of this order on September 5, 2001.

On September 12, 2001, IGT filed a second post-trial motion. (Exhibit No. 3) This second post-trial motion repeated the twenty-eight grounds for relief stated in the initial post-trial motion. In its second motion, IGT did not file a memorandum of law but craved reference to the memorandum of law it filed in support of its initial motion.

On October 29, 2001, the trial judge denied IGT's second post-trial motion, noting that its "motion raise(d) no issues that were not already considered by the Court in denying IGT's post-trial motion." (Exhibit No. 4) IGT filed and served its notice of appeal on November 22, 2001.

On May 20, 2002 Collins filed a motion to dismiss IGT's appeal based on lack of subject matter jurisdiction due to IGT's failure to timely file and serve its notice of appeal. This motion was based on Rule 203(b)(1), SCAR, and on case law from both the South Carolina Supreme Court and the South Carolina Court of Appeals, namely *Quality Trailer Products, Inc. v. CSL Equipment Co., Inc. and I Corp.*, 349 S.C. 216, 562 S.E.2d 615 (2002) and *Coward Hund Construction Co., Inc. v. Ball Corp. and Carolina Glass Contractors, Inc.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999).

Following oral argument, the Court of Appeals issued an opinion on September 4, 2002, dismissing this appeal. Thereafter, IGT sought an *en banc* rehearing from the Court of Appeals. Because four of the nine judges were disqualified in the case, the Court of Appeals requested that the case be certified to the Supreme Court. By order

dated January 10, 2003, the South Carolina Supreme Court deemed the request for rehearing denied. This petition for writ of certiorari followed.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. **WHETHER THE COURT OF APPEALS CORRECTLY APPLIED *COWARD HUND* AND *QUALITY TRAILER* TO HOLD THAT THE SUCCESSIVE POST-TRIAL MOTION IN THIS CASE DID NOT TOLL THE TIME FOR FILING A NOTICE OF APPEAL?**

II. **WHETHER THERE IS ANY COMPELLING REASON TO GRANT CERTIORARI IN THIS CASE WHERE THE CONSIDERATIONS ENUMERATED IN RULE 226(b), SCAR, ARE NOT APPLICABLE AND RECENT PRECEDENT FROM THIS COURT RESOLVES THIS CASE?**

III. **WHETHER IGT INCLUDED IRRELEVANT MATTER IN ITS APPENDIX WHERE IT INCLUDED ITS BRIEF ON THE MERITS OF THE UNDERLYING APPEAL?**

ARGUMENT

I. **THE COURT OF APPEALS CORRECTLY RULED THAT IGT'S SUCCESSIVE POST-TRIAL MOTION DID NOT TOLL THE TIME FOR FILING A NOTICE OF APPEAL.**

A. Error Preservation

IGT has been consistent throughout this appeal in its misunderstanding of appellate preservation principles. It continues to assert that IGT was required to file its second

post-trial motion in order to preserve issues for appellate review. This is simply not correct.

IGT's argument that its second post-trial motion was required to preserve issues for appellate review reveals its fundamental misapprehension of error preservation rules. First of all, post-trial motions are not necessary to preserve issues that have been ruled upon at trial. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998); *Bailey v. Segars*, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001) *cert. granted on other grounds* (January 10, 2002) "[Only] if the losing party has raised an issue in the lower court, but the court fails to rule upon it, [must] the party . . . file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Thus, many of the arguments raised in IGT's initial post-trial motion, having already been ruled on during trial, did not need to be raised in any post-trial motion. Most certainly, they did not need to be raised in *two*, successive post-trial motions.

The basic rule of error preservation applying to an appellant such as IGT is that the issue sought to be argued on appeal must have been raised to and ruled on by the trial judge. *Id*[.]; *Hubbard v. Rowe*, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939) ("In matters of appeal, so far as it appears, all that this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower court and passed upon by that court.")

IGT's error preservation analysis is based on the mistaken belief that a Rule 59(e) motion must reassert every argument made and ruled upon at trial in order to

preserve the issue for appeal. However, this has never been the rule in South Carolina. Numerous appellate court decisions as well as Chief Justice Toal's book on appellate practice make it very clear that a motion to alter or amend a judgment is only necessary when the losing party has raised an issue in the lower court but the court failed to rule on it. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.") Jean Hoefer Toal, et al[.], *Appellate Practice in South Carolina*, 2nd Ed. at p. 59 (2002). ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial judge but not yet ruled upon.")

I'On makes it crystal clear that error preservation principles should not be tortured as IGT suggests to require an appellant to revisit rulings already made by the trial judge. "However, when the lower court rules in one party's favor, it is not necessary for that party to return to the court and ask for a ruling on remaining issues and arguments in order to preserve those arguments for use in an appeal." 338 S.C. at 423, 526 S.E.2d at 725.

Even assuming the necessity for IGT's initial post-trial motion in order to preserve all issues for appeal, the second virtually identical post-trial motion was definitely *not* required. Despite IGT's arguments to the contrary, our appellate courts have never required trial judges to rule explicitly on every ground presented to them in post-trial motions. *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.C.2d [sic] 265, 267 (1990). ("We have . . . refused to require trial

judges to explain reasons for ruling on [a request for a new trial as the thirteenth juror]); *Bailey v. Segars*, 346 S.C. 359, 364, 550 S.E.2d 910, 912 (Ct. App. 2001) (holding that a form order denying a motion for JNOV and new trial coupled with the transcript of the proceedings was sufficient to allow appellate review and a Rule 59(e) motion was not required to preserve issues for appeal), *cert. granted on other grounds* (Jan. 10, 2002); *Armstrong v. Union Carbide*, 308 S.C. 235, 237, 417 S.E.2d 597, 599 (Ct. App. 1992) (stating that while order of the trial court did not separately list and specifically address each of the twenty-nine exceptions raised, it was clear from reviewing the order that all grounds raised below were considered); Rule 52(a), SCRCP ("Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)").

IGT asserts it made its second post-trial motion because of issue preservation requirements. It argues that it filed its second post-trial motion because "IGT's counsel was concerned" with error preservation law and that its "counsel was convinced" that Judge Breeden, in his initial post-trial order, had not ruled on several issues at all and had not ruled with sufficient explicitness on any issue to preserve the issues for appellate review. (Petition, p. 6). It contends that IGT determined that Judge Breeden failed to explicitly rule on nearly all of the twenty-eight grounds contained in its post-trial motions. (Petition, p. 9). However, a review of IGT's second post-trial motion reveals the fallacy of this argument.

After receiving Judge Breeden's initial Order Denying Defendant's Motion for Judgment N.O.V., New Trial, and New Trial Nisi Remittitur, IGT filed a motion to alter or

amend "pursuant to Rule 59(e)", requesting that the "Court make specific rulings, and the basis therefore, as to each ground raised" in IGT's first post-trial motion, and reiterated the twenty-eight grounds previously enumerated.

Although IGT now asserts it needed to make this second motion to preserve its thirteenth juror argument, a review of the Rule 59(e) motion itself shows the fallacy in this assertion. Nowhere in its second post-trial motion does IGT state that the trial judge failed to rule on its thirteenth juror argument. Thus, it is impossible to see how the Rule 59(e) motion could have preserved this issue. At best, IGT's argument on this is disingenuous. At worst, it is a 20-20 hindsight ploy created to avoid the result of *Coward Hund* and *Quality Trailer*.

The Court of Appeals recognized this second motion for what it was, a successive post-trial motion which was an inappropriate Rule 59(e) motion. The Court of Appeals properly held that this second post-trial motion was not a proper Rule 59(e) motion and therefore did not toll the time for appealing Judge Breeden's August 29, 2001 Order. Accordingly, IGT's November 21, 2001 notice of appeal was untimely.

In summary, IGT's error preservation arguments are premised on several fallacies. First, IGT seems to believe that even though Judge Breeden had ruled during the trial on many of the grounds set forth in IGT's post-trial motions, it was necessary for IGT to raise all those issues again in a post-trial motion. This is simply wrong. Rule 59(e) motions to alter or amend are required when the trial judge fails to rule on an issue raised to him or her.

Tally v. S.C. Higher Educ. Tuition Comm., 289 S.C. 483, 488, 347 S.E.2d 99, 101 (1986) (holding that an issue raised to but not ruled on by the trial court is not preserved and the complaining party must move to amend the judgment pursuant to Rule 59(e), SCRCP). Accordingly, it was not even necessary for IGT to file its initial post-trial motion in order to preserve the majority of the arguments raised therein because it is apparent from the motion itself that Judge Breeden had already ruled on most of those issues during trial. Admittedly, there was no harm in IGT's filing of its initial post-trial motion; Collins only points out the lack of necessity for raising many of the arguments in a post-trial motion to illustrate IGT's misapprehension of appellate preservation rules.

The next fallacy advanced by IGT is that Judge Breeden's initial post-trial order did not rule on the issues raised and that IGT was required, in order to preserve the issues for appellate review, to request him to revisit the issues yet *again*. Judge Breeden's order clearly stated that "[a]fter carefully reviewing the matter, I conclude that the motions should be denied." It is absolutely clear from the order itself that Judge Breeden denied *all* arguments advanced by IGT in support of its motions for JNOV, new trial, and new trial remittitur. With the issuance of that order, the finality of the jury verdict was restored and IGT's time for filing its notice of appeal began to run upon its receipt of the order denying the motion. Since the trial judge's initial post-trial order did not in any way alter or amend the judgment, IGT's second post-trial motion was not a permissible successive motion and did not toll the time for filing IGT's notice of appeal. Plainly, IGT is wrong that Judge Breeden's first post-trial order failed to explicitly rule on issues that had been raised in its initial

post-trial motion. Judge Breeden's post-trial order stated that he was denying *all* motions. Thus, even assuming arguendo that IGT was required to parade all trial rulings back before the trial judge for a post-trial ruling, IGT accomplished that by filing its initial post-trial motion. Judge Breeden's initial post-trial order unambiguously denied *all* motions. Thus, IGT's time for appeal began to run upon its notice of that denial.

B. Coward Hund and Quality Trailer are squarely on point.

Just as in the realm of error preservation, there is a fundamental difference between IGT's interpretation of controlling precedent and Collins' understanding of it. It would be difficult to find two cases more squarely on point to this case than *Coward Hund* and *Quality Trailer*. Nevertheless, IGT attempts to distinguish them by arguing that *Coward Hund's* holding is limited to cases involving successive Rule 59(e) motions and that *Quality Trailer's* holding applies only to successive motions for new trial or JNOV. There is no language in either case to warrant such a restrictive interpretation. It is the successive nature of the post-trial motion that is important, not the *type* of post-trial motion involved. Rule 203, SCACR, applies to motions for JNOV, motions to alter or amend the judgment, and motions for new trial, staying the time for appeal until receipt of written notice of entry of the order ruling on such motion. When an order is issued denying the post-trial motion, the finality of the judgment is restored and the time for appeal commences. Where, as here, the losing party files another post-trial motion in the face of that denial, the tolling provisions of Rule 203 are

not resurrected. This is the crux of the holding in both *Coward Hund* and *Quality Trailer*.

As the Court of Appeals correctly held, *Coward Hund* and *Quality Trailer* control and IGT's second post-trial motion did not toll the time for serving the notice of appeal. IGT's attempts to distinguish those cases factually from the matter at hand are unavailing. Moreover, contrary to the arguments raised by IGT, the decision by the Court of Appeals *is* consistent with the prevailing rule in the federal courts. As noted in *Coward Hund*, "a second motion for reconsideration is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration." 336 S.C. 1, 3, 518 S.E.2d 56, 58, citing 12 James W. Moore, et al., *Moore's Federal Practice*, ¶ 59.37 at 59-123 (3rd ed. 1999).

The federal cases cited by IGT in its Petition for Certiorari, on the other hand, are not even applicable since they do not involve successive post-trial motions. *Forrest v. Occidental Petroleum Corp.*, 917 F.2d 566, 6 (9th Cir. 1990) ("In cases addressing the time for appeal, we have generally found a motion for reconsideration to be within Rule 59(e) if it requests a substantive change in the judgment, regardless of the grounds upon which it is raised."); *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 39 Fed. R. Serv. 2d 1067, 739 F.2d 1415 (1984) ("We have consistently held that if a motion is served within ten days of judgment and it could have been brought under Rule 59(e), it tolls the time for appeal although it does not expressly involve Rule 59"); *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1248 (9th Cir. 1982) (stating a rule 59(e) motion was timely filed although some supporting affidavits were filed after the

ten-day period); *Cloud v. Summers*, 110 F.3d 67, 1 (9th Cir. 1997) ("[I]f a motion served within ten days of judgment could have been brought under Rule 59(e), the motion tolls the time for appeal even if Rule 59 is not expressly involved."); *Barnett v. Cross*, 894 F.2d 1336, 1 (6th Cir. 1990) ("A timely rule 59(e) motion tolls the appeal time for all parties until entry of the order granting or denying the motion.) Two of these ninth circuit cases as well as the sixth circuit case are unpublished decisions and should not even be cited to this Court[2] Even more importantly, none of these cases is relevant here because none involved successive post-trial motions. The federal cases cited by IGT all deal with an initial post-trial motion which was timely filed. They have no application to this case where the issue is whether the filing of an improper successive post-trial motion tolls the time for filing notice of appeal.

Unlike the federal cases cited by IGT, the legal principles and reasoning articulated in *Coward Hund* and *Quality Trailer* are compelling. As noted by the Court of Appeals:

> *Coward Hund* and *Quality Trailer* clearly stand for the proposition that although a successive post-trial motion for relief is permissible, the subsequent motion must seek relief on issues coming to light as a result of an order following

[2] Local Rule 36-3 proscribes the citation of unpublished orders in the ninth circuit except under three limited instances, none of which are applicable here; Rule 28(a) of the U.S. Court of Appeals 6th Cir. states that the citation of unpublished decisions is disfavored; *In re Sealed Case*, 2003 WL 231249 (E.D. Mich.) at 5 ("[I]t is well-established law in this circuit that unpublished cases are not binding precedent.")

> an initial post-trial motion that **alters or amends** the judgment. The successive motion cannot be a motion to alter or amend that merely recites arguments in a previous Rule 59(e) motion as was the case in *Coward Hund*, or the re-captioning of a previous Rule 50 or Rule 52 motion as a Rule 59(e) motion, as was done in *Quality Trailer*.
>
> *Collins Music Co., Inc. v. IGT*, No. 2002-OR-405 (S.C. Ct. App., filed Sept. 4, 2002)

Reviewing the two post-trial motions filed by IGT, the Court of Appeals held that IGT's second post-trial motion was not an appropriate Rule 59(e) motion but was simply a successive motion for JNOV and new trial. Accordingly, the Court of Appeals, relying on *Coward Hund* and *Quality Trailer*, held the second post-trial motion did not toll the time for serving the notice of appeal. Unless this Court wants to change its decision in *Quality Trailer*, the Court of Appeals' decision should stand and certiorari should be denied.

II. THERE IS NO COMPELLING REASON FOR GRANTING CERTIORARI IN THIS CASE.

Rule 226(b), SCAR, sets out five considerations for granting certiorari. none of them apply here. Indeed subsection (1), concerning novel questions of law is particularly inapposite where recent and compelling precedent exists on this issue. If there was any doubt concerning the propriety of the Court of Appeals' reasoning in *Coward Hund*, this Court put that concern to rest in *Quality Trailer*. The Court of Appeals fully considered the arguments raised by IGT and applied the principles annunciated in both *Coward Hund* and *Quality Trailer*.

No useful purpose would be served by revisiting those issues again.

Moreover, the "special and compelling reasons" advanced by IGT in its Petition for Certiorari are unavailing. First, IGT asserts confusion now exists because the Court of Appeals' decision somehow changes the law on error preservation. It should be clear to this Court that the only one confused on error preservation principles is IGT. The Court of Appeals' decision does not contravene prior case law on error preservation; instead, it follows the principles set forth by this Court in *Quality Trailer* in holding that IGT's second, successive post-trial motion did not toll the time for filing appeal.

Secondly, IGT asserts the Court of Appeals failed to "consider the doubt raised by the trial judge's qualified rulings on IGT's issues." In fact, the Court of Appeals simply disagreed with this characterization of Judge Breeden's initial post-trial order, finding instead that "[t]he circuit court judge issued a written order denying all of IGT's post-trial motions." This finding is totally consistent with the language of Judge Breeden's order dated august 29, 2001 wherein he stated he was denying "all motions."

Finally, IGT alludes to "the unusual posture of this case" and asserts that the recusal of four members of the court of Appeals "has deprived IGT [of] any review of the decision." In response, to the extent that IGT now contends the original decision of the Court of Appeals should be called into question by the recusal of one of the panel members, the letter of Claire Allen, deputy clerk of the Court of Appeals, dated January 27, 2002, notes that Judge Goolsby's disqualification arose after issuance of the

decision and only impacted on his involvement in the petition for rehearing. Moreover, it is ridiculous for IGT to contend that it has been deprived of review of the Court of Appeal's decision. This Court is reviewing that decision now as it considers whether or not to grant certiorari.

III. BY ATTACHING ITS BRIEF ON THE MERITS, IGT HAS SOUGHT TO INCLUDE IMPROPER MATTER IN ITS APPENDIX TO ITS PETITION FOR CERTIORARI.

Collins submits that the second through sixth entries in the Index of the Appendix, comprising over eighty pages, are totally irrelevant to the issue before this [C]ourt. Collins' motion to dismiss this appeal was based on the lack of subject matter jurisdiction which existed because of the successive post-trial motions filed by IGT. It is clear from the Court of Appeals' decision that the panel did not consider the underlying merits of IGT's appeal. It is both unnecessary and improper to address the underlying merits of a case when the sole issue is subject matter jurisdiction. Nevertheless, IGT seeks to include in the appendix before this Court its seventy-eight page brief on the merits of the appeal. Collins strenuously objects to the inclusion of this matter in the Appendix because it is completely irrelevant to the question of whether this appeal should be dismissed for lack of subject matter jurisdiction.

CONCLUSION

The court of Appeals correctly held that IGT's purported Rule 59(e) motion was a successive post-trial motion which did not toll the time for filing notice of

appeal. This decision was rendered after both written and oral arguments on the issue were received and after thorough consideration of the *Coward Hund* and *Quality Trailer* decisions. Unless this Court decides to alter its own recent precedent in *Quality Trailer*, no viable reason exists to grant certiorari in this case. The Petition for Certiorari should be denied.

Respectfully submitted, this 7th day of March, 2003.

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
John L. Breeden, Jr., Circuit Court Judge

Opinion No. 2002-OR-405
(S.C. Ct. App. filed September 4, 2002)

Collins Music Co., Inc., Respondent,

v.

IGT a/k/a IGT-North America, Petitioner.

REPLY TO RESPONDENT'S RETURN TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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While IGT has fully addressed, in its Petition, all of the substantive issues in Argument I of Respondent's Return, it will reply to Collins' statements that IGT has a "fundamental misapprehension of error presentation rules" (Return, p. 7), and that "there is a fundamental difference between IGT's interpretation of controlling precedent and Collins' understanding of it." (Return, p. 13).

Regarding its claim of IGT's misapprehension of error preservation rules, throughout Argument I, Collins mischaracterizes IGT's position with respect to filing its initial post-trial motions. Those motions, while one step in the judicial process to preserve issues for appeal, were filed not specifically for preservation purposes. They were filed to provide an opportunity for the trial court to reconsider and correct many significant rulings it made during the course of the trial. Collins even concedes that IGT's initial post-trial motions were proper and appropriate. (Return, p. 12). It is IGT's 59(e) motion that was made specifically for purposes of error preservation.

It is correct that a fundamental difference exists between Collins and IGT. However, that fundamental difference stems not from any misunderstanding of error preservation law by IGT, but from an overly broad reach Collins and the Court of Appeals seek to assign to this Court's decision in *Quality Trailer*, a decision that did not even exist during the post-trial period of this case. *Quality Trailer* should be construed upon its facts, circumstances and with consideration to the specific relief sought in the motions of the appellant I. Corp. Collins' argument for such an expansive reading and application of *Quality Trailer* is unwarranted, unfair, and is aimed solely at circumventing the merits of IGT's appeal to protect a $15 million verdict.

Replying to Argument II, the Court of Appeals applied *Quality Trailer* to IGT's post-trial and 59(e) motions without giving any consideration to the differences between the facts, circumstances and the specific relief sought by the motions of IGT and those of the [I. Corp.] in *Quality Trailer*. Instead, the Court of Appeals held that the trial court's post-trial order adequately ruled on and

preserved for appeal all issues simply by its use of the words "denying all motions." The court disregarded the effect of the qualifications attached to the denial (see IGT's Petition for Writ of Certiorari, p. 9-10). This view is inherently flawed. Since all post-trial orders contain some form of the words "deny" or "grant", if the Court of Appeals' view is accepted, then any explicitness requirement of a trial courts' ruling and the use of 59(e) motions would be effectively eliminated in jury trials. IGT submits this cannot be [the] intent of this Court's holding in *Quality Trailer* nor the reach of its application. That reach, if actually intended, would certainly be a change in procedure under the South Carolina Court Rules that traps appellants and their attorneys in a procedural catch-22. Moreover, this change would have occurred after IGT's motions were made and decided, and should therefore not be applied retrospectively to dismiss IGT's appeal in any event.

In addition, there are a number of recent appellate court cases in the same procedural posture as this case that have been decided on their merits.[1] *See Wooten v. S.C.D.O.T.*, 333 S.C. 464 (1999); *Mullis v. Trident Emergency Physician*, Op. No. 3548 (S.C. Ct. App., filed September 9, 2002); *Rorrer v. P.J. Club, Inc.*, 347 S.C. 560 (Ct. App. 2001); *Curcio v. Caterpillar*, 334 S.C. 266 (Ct. App. 2001); *Hundley v. Rite Aid*, 339 S.C. 285 (Ct. App. 2000); *James v. Lister*, 331 S.C. 277 (Ct. App. 1998); *Krepps v.*

[1] In each of these jury trial cases, the appellant first made post-trial motions for JNOV and new trial, which were clearly "denied." Subsequently, the appellants all made a 59(e) motion, which was also denied by the trial court. Not one of these appellants filed their notice of appeal within thirty days from the date it received the order denying their post-trial motions for JNOV or new trial.

Ausen, 324 S.C. 597 (Ct. App. 1996); *Johnson, et al. v. Hoechst Celanse*, 317 S.C. 415 (Ct. App. 1995); *Hassel v. National States*, 313 S.C. 266 (Ct. App. 1993). One of these cases, *Mullis v. Trident*, was decided even after the *Quality Trailer* decision was issued. An overly broad reading of *Quality Trailer* will undermine the finality of any case in which there were successive post-trial motions as in the cases identified above. Under the broad application of *Quality Trailer* argued by Collins, this Court nor the Court of Appeals would have had subject matter jurisdiction to decide the merits of those appeals. These are not isolated instances, and no doubt, there are any number of cases in this procedural posture that have not yet reached the appeal stage. The significance of the issues raised in IGT's Petition can also be seen by this Court's grant of certiorari in *Hattie Elam v. SCDOT*, 0000-00-000 which, while factually different, presents similar issues concerning the scope of *Quality Trailer* and error preservation in post-trial motions.

Replying to Argument III in which Collins strenuously objects to the inclusion of IGT's Initial Brief in the Appendix, it was included in the Appendix for two reasons. First, Rule 226(e)(1) specifically provides that "the Appendix *shall* include the following: (1) A copy of the Record on Appeal and *Brief*(s)." (Emphasis added.) Second, realizing that IGT's Petition for Writ of Certiorari does not involve the underlying meritorious issues in IGT's Appeal and anticipating an objection from Collins, counsel for IGT also confirmed with a deputy clerk of this Court that IGT's Initial Brief, having been filed in the Court of Appeals,

should, in accordance with the Rule, be included in the Appendix. Collins' objection is without merit.

Respectfully submitted,

March 12, 2003

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The South Carolina Court of Appeals

Hattie Rose Elam, Respondent,

v.

South Carolina Department
of Transportation, Appellant.

The Honorable Daniel E. Martin, Sr.
Allendale County
Trial Court Case No. 1999-CP-03-008

ORDER

The South Carolina Department of Transportation (SCDOT) appeals the trial court's denial of its motions for judgment notwithstanding the verdict (JNOV) and new trial following a jury verdict for Hattie Rose Elam. We dismiss the appeal as untimely.

In March 1998 Elam was injured when she lost control of her vehicle and struck a utility pole while traveling on South Carolina Highway 125 in Allendale County. Elam brought this action against SCDOT under the South Carolina Tort Claims Act.[1] She alleged her accident was caused by excessive water on the highway and SCDOT was grossly negligent in failing to properly maintain the road.

At trial SCDOT argued, among other things, that it had made repairs to the road in February 1998 and was

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[1] S.C. Code Ann. §§ 15-78-10 to -200 (Supp. 2001).

not thereafter put on notice of any continuing problems before Elam's accident occurred. Citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997), SCDOT contended a governmental entity must be on notice that the problem is continuing for liability to be imposed after remedial measures have been taken.[2] SCDOT also argued it was entitled to immunity under section 15-78-60(8) of the Tort Claims Act[3] because Elam's accident was caused solely by temporary or natural conditions and not any act of negligence by an employee of SCDOT.

The trial court denied SCDOT's request for a directed verdict and submitted the case to the jury. The court charged the jury on (1) notice and (2) temporary or natural conditions.

On January 10, 2001, immediately after the jury returned a verdict for Elam for $250,000, SCDOT made motions for a JNOV and a new trial. As to the motion for JNOV, SCDOT argued in relevant part that (1) there was no evidence of notice and (2) there was no evidence the accident was caused by anything other than an act of God. The trial court inquired whether SCDOT had requested a charge on an act of God. SCDOT's counsel responded by arguing the "act of God defense" was the Tort Claims Act's immunity provision for temporary or natural conditions.

The trial court stated it was of the opinion SCDOT had notice of the problem with the road. The court concluded: "[T]he question as to whether or not the defendant

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[2] SCDOT's attorneys referred to this as the concept of "interrupted notice."

[3] S.C. Code Ann. § 15-78-60(8) (Supp. 2001).

was negligent under these circumstances was a matter to be determined by the Constitutionally empanelled triers of the facts, the jury. The jury ha[s] made that determination. Your motion is respectfully denied."

After further colloquy regarding the grounds for JNOV, the court stated: "Your motion is denied and still stands." The court also denied the motion for a new trial.

SCDOT thereafter filed a motion under Rule 59(e), SCRCP that mirrored all of the grounds raised at trial in its motions for JNOV and new trial. The trial court denied the Rule 59(e) motion in an order dated April 6, 2001. SCDOT served its notice of appeal on April 27, 2001, more than thirty days after the trial court originally ruled on SCDOT's motions for JNOV and new trial in January 2001. *See generally* Rule 203(b)(1), SCACR ("A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.").

In *Quality Trailer Products, Inc. v. CSL Equipment Co.*, 349 S.C. 216, 562 S.E.2d 615 (2002), our supreme court held that, where the appellant's Rule 59(e) motion merely reiterated, with a few procedural alterations, the grounds previously raised and ruled upon in its prior motion for JNOV and new trial, its Rule 59(e) motion amounted to a successive motion for JNOV and new trial and did not toll the time for serving the notice of appeal. The court noted, "Despite its caption, [the] second motion was not a Rule 59(e), SCRCP, motion. The motion did not ask the trial court to rule on an issue presented but not ruled upon in any previous motion." *Id.* at ___, 562 S.E.2d at 617.

Upon the request of this Court, the parties in the current appeal submitted memoranda addressing whether the appeal is untimely based upon the supreme court's decision in *Quality Trailer Products*.

SCDOT concedes its Rule 59(e) motion reiterated the issues previously argued in its post-trial motions for JNOV and new trial. SCDOT now asserts, however, the trial court never "explicitly" ruled on the issues of (1) notice and (2) temporary or natural conditions in regards to its JNOV motion. It contends the time for appeal was stayed while it attempted to satisfy what it perceived as a requirement of *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991) to obtain specific findings.

In *Noisette*, the supreme court, citing Rule 52(a) of the South Carolina Rules of Civil Procedure, held that where the circuit court did not explicitly rule on the argument that Noisette failed to prove Ismail was a permissive user of a vehicle, it was not available for consideration on appeal. *Noisette* is distinguishable as it involved a declaratory judgment heard by the trial court alone; thus, the trial court was required to make special findings of fact and law. *See* Rule 52(a), SCRCP ("In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon. . . . Findings of fact and conclusions of law are unnecessary on decisions of motions [except those made pursuant to Rule 41(b)]. . . . "). Unlike *Noisette*, the case on appeal was tried before a jury; therefore, the provisions of Rule 52(a) are not applicable. In any event, *Noisette* further provided that, "where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or

specific factual finding." *Id.* at 58, 403 S.E.2d 123, *cited with approval in In re Luckabaugh*, Op. No. 25503 (S.C. Sup. Ct. filed July 22, 2002) (Shearouse Adv. Sh. No. 25 at 51).

Moreover, the record indicates the trial court considered all of SCDOT's arguments and, as SCDOT acknowledges, it was clear the judge denied the motion for JNOV.[4] Once the trial court has considered all of the relevant arguments and clearly denies a motion for JNOV, the court's failure to detail all of the arguments that were rejected in its ruling does not make the denial of the motion any less explicit. *See, e.g., Bailey v. Segars*, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001) (holding a form order which stated only that appellant's post-trial motions for JNOV and new trial were denied was, together with the record of the proceedings, adequate to enable appellate review and a Rule 59(e) motion was not required to preserve the issues for appeal; we stated therein, "[p]ost-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not ruled upon"), *cert. granted on other grounds* (Jan. 10, 2002).

This situation is distinguishable from *Bowen v. Lee Process Systems, Inc.*, 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000), in which the trial court granted summary judgment but failed to state on which of the asserted grounds. We vacated the grant of summary judgment and

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[4] SCDOT acknowledges in its memorandum: "At the end of the day of January 10, 2001, it was clear that SCDOT's JNOV motion had been denied."

remanded the case to the trial court to enter an order identifying the material facts that it found undisputed and the grounds for its decision as they were not discernable on appeal. In contrast, in the current case the trial court clearly and expressly denied the motions for JNOV and new trial on all of the grounds raised by SCDOT and reaffirmed its determination the matter was properly decided by a jury. Since the trial court provided an explicit ruling and there were no remaining issues to be ruled upon, the time for appeal commenced upon the denial of the post-trial motions and was not stayed by a Rule 59(e) motion that raised the same issues.

Additionally, we note in its Rule 59(e) motion SCDOT nowhere asserts or alleges the trial court failed to rule on any of the previously-raised grounds; rather, it admittedly lists all issues that were raised to the trial court in support of its motions for JNOV and new trial and argues the trial court erred in denying those motions. *See Quality Trailer Products*, 349 S.C. at ___, 562 S.E.2d at 617 ("The motion did not ask the trial court to rule on an issue presented but not ruled upon in any previous motion."). Under these circumstances, we conclude SCDOT's appeal is untimely because SCDOT's Rule 59(e) motion did not stay the time for appeal. Consequently, the appeal should be DISMISSED.

IT IS SO ORDERED.

/s/ C. Tolbert Goolsby J.

/s/ William L. Howard J.

/s/ M. Duane Shuler J.

Columbia, South Carolina

July 25, 2002

cc: Pete Kulmala, Esq.
H. Woodrow Gooding, Esq.
Mark B. Tinsley, Esq.
The Honorable Mary Jean Carlson

FILED
7/25/02 dhp

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Daniel E. Martin, Sr., Circuit Court Judge

Case No. 99-CP-03-008

Hattie Rose Elam, ...Respondent

v.

South Carolina Department.....Appellant,
of Transportation,

APPELLANT'S PETITION FOR REHEARING

Appellant, South Carolina Department of Transportation (SCDOT) now Petitions this Court for Rehearing of the July 25, 2002 Order by which the appeal was dismissed as untimely. The grounds for this Petition are:

> IN DISMISSING THE APPEAL AS UNTIMELY, THE COURT APPARENTLY: a) MISAPPREHENDED APPELLANT'S ARGUMENT ON "NOTICE"; b) MISCONSTRUED PRIOR INTERPRETATIONS OF RULE 59(e); and, c) MISAPPREHENDED THE PURPOSE OF RULE 59(e).

ANALYSIS

By Order dated and filed July 25, 2002, this Court dismissed as untimely the appeal of SCDOT, reasoning that "[S]ince the trial court provided an explicit ruling and there were no remaining issues to be ruled upon, the time for appeal commenced upon the denial of the post-trial motions and was not stayed by a Rule 59(e) motion that raised the same issues". (Order, p.3). The Court supported this decision saying that (1) "SCDOT concedes its Rule 59(e) motion reiterated the issues previously argued in it post-trial motions for JNOV and new trial"; (2) SCDOT has misplaced reliance on *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991), the premise of which is not applicable to cases tried before a jury or motions under Rule 59(e); and (3) that "SCDOT acknowledges it was clear the judge denied the motion for JNOV".

These premises do not support dismissal of the appeal because the trial judge's simple oral denial of the JNOV did not distinguish between, nor definitively rule upon, the two separate notice issues raised in the JNOV. Consequently, appellant was required by well established precedent to seek a specific ruling on each ground to preserve each issue for appeal. The court had clearly ruled, but the oral ruling did not specifically rule on each issue. It is inevitable that any motion seeking clarification of an ambiguous ruling will discuss the same issue in each motion. However, that fact alone should not automatically lead to a dismissal of an appeal when the motion was serving the purpose required by the court of seeking a definitive ruling of issues to preserve them for appeal.

IN DISMISSING THE APPEAL AS UNTIMELY, THE COURT APPARENTLY MISAPPREHENDED APPELLANT'S ARGUMENT ON "NOTICE"

This [C]ourt may have misapprehended Appellant's argument on notice because the Order dismissing the appeal did not note that Appellant had two separate and independent "notice" issues, and that Appellant sought a specific ruling on two separate notice issues to preserve both for appeal. The issues are, first, the legal standard for notice is DOT as provided in *Summer v Carpenter*, 328 S.C.36, 492 S.E. 2d 55 (1996). Second, the issue of whether there was evidence in the record to support a finding of notice after the repairs on February 10, 1998.

At the conclusion of trial, SCDOT had moved for JNOV on the ground that there was no evidence of notice after February 10, 1998, when SCDOT's crews last worked on water drainage at the site. The court initially referred to Trooper King's testimony, who only testified to events and notice prior to the remedial measures of January 5 and February 10, 1998. The court then expressed his opinion that SCDOT was on notice and the Jury had made that determination. SCDOT sought to draw the court's attention to the lack of evidence of notice *after* the remedial measures, and, following argument by Elam's counsel, the court said "Your motion is denied and still stands". (R.p.429).

After this ambiguous oral ruling, appellant was compelled to file a motion under Rule 59(e) to obtain clarification of the court's decision and to preserve both a legal and factual ground for appeal and possible reversal of the trial court's decision. Appellant had argued in the trial court that interrupted notice as provided in *Summer v. Carpenter*, was the applicable law, and that there was no evidence in the record that DOT had received notice of the condition after February 10, 1998. The trial court's sole basis for denying the JNOV motion was that the

testimony of Trooper King who testified to events in December 1997, *before* repairs were undertaken in January and February 1998. Thus, the trial judge could be ruling in one of two ways:

First, the trial judge's oral ruling denying the motion for JNOV could mean that, as a matter of law, the remedial measures performed on February 10, 1998 did not break the chain of notice which existed prior to repairs, and rejecting *Summer v. Carpenter*, as the applicable law on notice. If this was the court's ruling, which is implied by its reliance on pre-repair testimony of Trooper King, then its decision was inconsistent with its charge on interrupted notice and was a significant change in its view of the law of the case because the court was now holding that any notice, before or after the repairs, was sufficient. This ruling would be a new issue, raised for the first time in the denial of the JNOV motion, and in and of itself, justify a Rule 59(e) motion to obtain clarification.

Second, the trial judge's order could be interpreted to be ruling that even under the theory of interrupted notice required by *Summer v. Carpenter*, and charged by the court, there was evidence in the record to support a finding that SCDOT has post-repair notice of the condition after February 10, 1998. If this was the court's ruling, and the court relied only [upon] Trooper King's testimony about conditions before the repairs cited during his oral ruling, then the ruling was not supported by Trooper King's testimony, and in the view of Appellant any other evidence in the record.

Either of these rulings was sufficient to deny the JNOV, however, it was impossible to determine from the transcript which decision the court had made. Moreover, it

was essential for Appellant to preserve both issues for appeal. If a ruling was not sought on the legal standard of *Summer v. Carpenter*. Respondent could argue that any notice to DOT was sufficient, and there was some pre-repair notice of the problem. If the objection, that there was no evidence of notice after the repairs, was not preserved, Respondent would likewise prevail by pointing to pre-repair notice. Without a clear ruling on both issues, Appellant would be whipsawed before this court by the argument that the trial judge in fact ruled on an unappealed ground.

Appellant desired to preserve both issues for appeal and therefore filed a Rule 59(e) motion which specifically raised both the legal and evidence issue on page 1 of its motion. The trial court responded to this argument by specifically ruling on both issues when it denied Appellant's Rule 59(e) motion in a thorough, but confusing explanation;

> "On the defendant's argument that, under South Carolina Law, notice of highway maintenance issues is governed by a theory of 'interrupted notice," as stated in *Summer v. Carpenter*, this court notes that the language in that case to which defendant refers is dictum and does not represent the applicable law in this state".

(R.p.011).

The trial court further ruled, "moreover, the defendant submitted a Jury charge on its theory of "interrupted notice," which was charged by this court". (R.p.12).

IN DISMISSING THE APPEAL AS UNTIMELY, THE COURT APPARENTLY MISCONSTRUED PRIOR INTERPRETATIONS OF RULE 59(e)

The denial of JNOV on January 10, 2001 was certainly a ruling on the Appellant's motion. However the mere denial of the motion, *in toto*, without indicating the reason for the denial, where the motion presents both legal and factual issues, does not suffice for purposes of issue preservation under prior decisions of this court.

Noisette v. Ismail, 304 S.C. 56, 403 S.E. 2d 122 (1991), has often been cited for the premise that a party must make a motion under Rule 59(e) to obtain an explicit ruling on a matter in order to preserve the issue for appeal. *See*, *Trivelas v. South Carolina Dept. of Trans.*, 558 S.E.2d 271 (Ct. App. 2001), citing *Noisette*, "(Ruling issue was not preserved for appellate review where the trial court did not explicitly rule on the appellant's argument and the appellant made no Rule 59(e) motion to alter or amend the judgment)"; *Widman v. Widman*, 348 S.C. 97, 557 S.E. 2d 693 (Ct. App. 2001) citing *Noisette*, "(holding an issue not preserved where the trial court does not explicitly rule on an argument and the appellant fails to make a Rule 59 (e) SCRCP motion to alter or amend the judgment on that ground)".

Two cases, in particular, reflect the need for a party to make a 59 (e) motion for the purpose of issue preservation when the trial court has made a ruling which does not specifically address an argument on an issue which the party later seeks to appeal.

In *Walker v. The Bluffs Apts.*, 324 S.C. 350, 477 S.E.2d 472 (Ct. App. 1996), the appellant sought to argue on appeal the common knowledge exception to the need for expert testimony. This Court ruled that, all though the appellant did argue the exception in opposition to the motion for summary judgment, the trial court ruled that

the expert was not qualified, but did not explicitly rule on the argument for application of the exception. This Court cited *Noixette v. Ismail* for the need to make a motion pursuant to Rule 59 (e), to preserve the issue.

In the case at bar, at the hearing on SCDOT's motion for JNOV, SCDOT argued the lack of evidence of post-repair notice, based upon the court's having charged it. However, during argument, the court focused only on the testimony of Trooper King as evidence of notice. Because Trooper King's testimony related solely to pre-repair notice and observations on the date of the accident, it appeared the trial court was not applying the legal standard which it had already charged to the Jury. By simply denying the motion, the court did not explicitly rule on the argument respecting the alternative questions of lack of evidence of post-repair notice on one hand, and applicability of the legal standard for interruption of notice on the other.

The trial court's denial of JNOV in this case poses a problem similar to that posed by the grant of summary judgment in *Walker v. The Bluffs Apts.* In that case, the appellant had lost on summary judgment after having argued his expert's qualifications and the common knowledge exception, but the court's ruling did not specifically address the common knowledge exception. Because the appellant did not make a 59(e) motion as to the common knowledge exception, this Court held that the issue was not preserved.

Here, SCDOT had argued for JNOV concerning post-repair notice. When the trial court initially denied JNOV, it appeared to be based upon a refusal to apply the post-repair notice provision of *Summer v. Carpenter*, and

SCDOT then argued lack of evidence of post-repair notice under that standard, after which the trial court simply denied the motion without giving an indication of whether the basis was the court's refusal to accept the *Summer v. Carpenter* provision, or existence of evidence of post-repair notice. Because the decision in *Walker v. The Bluffs Apts.* did not specifically refer to the common knowledge exception, this Court ruled that the issue was not preserved. Here, the ruling does not explicitly refer to either evidence of post-repair notice or refusal to accept *Summer v. Carpenter*'s notice provision. But, in dismissing the appeal, the Court has concluded that the trial court's ruling was sufficient to preserve the issue.

Although the trial judge denied the JNOV motion, his ruling on SCDOT's arguments is implicit at best. With respect to that portion of the JNOV motion addressing Act of God, the transcript reflects no ruling at all. In *Van Blarcum v. North Myrtle Beach*, 337 S.C. 446, 523 S.E.2d 486 (Ct.App. 1999), this Court held that, for purposes of issue preservation, an implicit ruling is insufficient, and that a party must make a Rule 59(e) motion to preserve the subject issue of the implicit ruling for appeal.

In that case, the City of North Myrtle Beach had attempted to argue on appeal that the master's order limits the city's discretionary authority pursuant to statute. This court held that the question was not preserved for appeal, commenting:

> Nowhere did the master explicitly treat the precise issue that the city now appeals, i.e., that a court, notwithstanding the cited statute, may allow vehicular traffic upon publicly-owned walkways and restrict the number and location of signs that can be placed upon the walkways. Indeed, the City

> in oral argument before this Court conceded as much, stating that the master implicitly addressed the issue. But an implicit ruling will not suffice.

Van Blarcum at 690, citing *Noisette v. Ismail.*

The relevance of *Van Blarcum v. North Myrtle Beach* to the case at bar must not be ignored. Following the JNOV/new trial motions of January 10, 2001, there was a denial of SCDOT's motion, with no expression from the trial court as to whether the court was concluding that *Summer v. Carpenter* did not apply, or that there was evidence of post-repair notice. The denial of the motion following argument of both issues was at most an implicit ruling as to each issue. Following the trial court's ruling on post-trial motions under the then-prevailing post-trial procedural law, SCDOT's next step would be to file a motion for reconsideration under Rule 59(e) in order to clarify the trial court's decision, and to preserve the issues which had been raised but not specifically addressed in the court's ruling. The dismissal of this appeal as untimely comes 18 months after the trial, and is based upon an opinion issued 14 months after the trial, which, for the first time, imposes the harsh penalty of dismissal on appeals which are predicated on 59(e) motions considered to be mere successive reiterations of earlier post-trial motions.

This is borne our by the fact that this Court had to go to other jurisdictions for support of its result in *Coward Hund*: "Because there are no South Carolina cases directly on point, we must look to the construction placed on the corresponding federal rules of civil procedure." *Coward Hund* at 58.

IN DISMISSING THE APPEAL AS UNTIMELY, THE COURT APPARENTLY MISAPPREHENDED THE PURPOSE OF RULE 59(e).

The Rules should not be interpreted to create a trap for lawyers reasonably seeking to follow this court's well-established precedent for preserving error.

At issue is the interpretation of a timely motion under Rule 59(e). The Rules of Civil Procedure are to be construed "to secure the just, speedy, and inexpensive determination of any action." (Rule 1 SCRCP). Other rules echo this admonition: Pleadings are to be construed to do substantial justice to all parties. (Rule 8(f): courts are to look to the underlying issue being raised and not to the formal designation, and finally, harmless error is to be ignored. (Rule 61)). In sum, courts are to address the issues raised and the rules should not be procedural traps for the unwary.

The rules specifically provide for both a motion for JNOV under Rule 50 and a motion for new trial under Rule 59. Both of these motions, however, must be made immediately after the jury is discharged or in the discretion of the court not more than 10 days after receipt of the notice of the order (Rule 50(e) and Rule 59(b)). The Rules also permit a motion to alter or amend a judgment under Rule 59(e). The Rule 59(e) motion is separate and distinct from the JNOV and new trial motions. The JNOV tests the sufficiency of the evidence to support the verdict, and the new trial motion tests the fairness of the trial. "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to "reconsider matters properly encompassed in a decision on the merits". *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834, 842 (1992). "[T]he motion serves the traditional role of asking

the trial judge to reconsider any previously raised and decided issue encompassed in the judgment. This type of rule 59(e) motion calls into question the correctness of the judgment on a material legal or factual issue". James F. Flanagan, *South Carolina Civil Procedure section 475,* (2d ed. 1996). Also, the Rule 59(e) motion has a separate 10 day time period in which it must be filed, that runs from the written notice of the entry of the order on new trial or JNOV.

These motions are separate and distinct and there is nothing in the language of any of the rules that prevents a Rule 59(e) motion after a JNOV motion. In fact, the Supreme Court and this court have emphasized since at least 1991 that a Rule 59(e) motion is required to preserve an issue for appeal that was presented but not ruled upon by the court. No case prior to April 1, 2002 suggested that filing a Rule 59(e) motion after a JNOV motion would make an appeal untimely. In *Quality Trailer Products v. CSL Equipment Company*, 349 S.C. 216, 562 S.E.2d 615 (2002), the Supreme Court relied in part on this Court's decision in *Coward Hund Construction Co. Inc. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999). The novelty of imposing a penalty on motions considered to be successive reiterations of earlier motions is borne out by this Courts acknowledgement that there was no precedent for its decision in this state's jurisprudence: "Because there are no South Carolina cases directly on point, we must look to the construction placed on the corresponding federal rules of civil procedure," *Coward Hund* at 58. Moreover, other than *Coward Hund*, the Supreme Court cited no in-state authority in support of this point. *Coward Hund Const. Co., v. Ball Corp.* is distinguishable

because it involved two successive, identical motions for reconsideration on the same precise issue.

Appellant filed its Rule 59(e) motion following well established precedent requiring such a motion to preserve both issues. Neither the trial judge, nor opposing counsel perceived the Rule 59(e) motion to be improper or untimely,[1] and in fact, the trial judge responded to Appellant's motion by specifically ruling on the two issues not definitively ruled upon in its oral denial of the JNOV motion. These motions were filed some fourteen months before *Quality Trailer Products*. Now, appellant is being retroactively denied a significant procedural right, the right to seek appellate review, for not anticipating a significant change in the law regarding post-trial motions which now appears to hold that in certain, yet unspecified, conditions, a clear ruling by the court on an issue is not required to preserve an issue for appeal.[2]

The rules are being interpreted to create a trap not only for the unwary, but for conscientious lawyers attempting to follow the Rules as interpreted by this Court and the Supreme Court. The Supreme Court, and this court have not overruled any in the long line of cases requiring a Rule 59(e) motion to preserve issues raised but

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[1] This fact distinguishes the present case from *Quality Trailer Products*, where the trial court immediately recognized the second motion was identical to the first motion. Moreover, in that case as well as *Coward Hund* the appellant filed the same *written* motion twice, and thus it was apparent on its face that no new issue was being raised in those cases.

[2] Under *Quality Trailer Products*, this appeal should not be dismissed because the Act of God issue was clearly raised in the post-trial motions, but clearly was not ruled upon.

not definitively ruled upon. Nor has *Widman v. Widman* or *Walker v. The Bluffs Apts.* been overruled, and these cases specifically hold that a party may not simply rely on arguments presented or implied rulings of the court to preserve issues for appeal. At the same time, *Quality Trailer Products* and *Coward Hund* appear to hold that raising an issue for clarification may destroy the right to appeal. The procedural trap is whether to seek clarification and a specific ruling, and risk losing the right to appeal, or foregoing a post-trial motion, and risk the argument that the issue has not been preserved. Neither *Quality Trailer Products*, nor *Coward Hund* provides any guidance on how to resolve the issue.

There would be no trap if *Quality Trailer Products* and *Coward Hund* were restricted to their narrow facts. Both cases involved successive, written motions that were virtually verbatim. These cases should not be applied to deny a right to appeal when the second motion, as in this case, was in response to an ambiguous oral order that did not differentiate between the legal issue of the standard for notice, and the evidentiary issue of whether there was any evidence of post-repair notice in the record. It is simplistic to argue that merely because the same issue was raised in both motions the second motion must be inappropriate. In fact, the same issue in some sense must be raised in the second motion because a new issue cannot be injected at that point. However, the key question is whether, at the JNOV/new trial stage, the trial court ruled on the issues and arguments later raised in the Rule 59(e) motion. A fair reading of the Rule 59(e) motion, reasonably interpreted to reach the issue intended to be raised, shows that as to the two notice issues, and the issue of act of God, the Rule 59(e) motion sought a definitive ruling from the

court and thus was not a mere successive reiteration of the earlier motion.

/s/ Pete Kulmala
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August 8, 2002
Barnwell, S.C.

STATE OF SOUTH CAROLINA, COUNTY OF ALLENDALE. Hattie Rose Elam Plaintiff, -vs- South Carolina Department of Transportation, Defendants.	IN THE COURT OF COMMON PLEAS CASE NO: 99-CP-03-008 **CERTIFICATE OF SERVICE**

I, Renee Hutson, Legal Secretary of Pete Kulmala, attorney for The South Carolina Department of Transportation, in the case of Hattie Rose Elam vs. South Carolina Department of Transportation, Case No. 99-CP-03-008, do hereby certify I have served the foregoing **Petition for Rehearing** to the Plaintiff's Counsel by mailing a copy with postage prepaid, by United States mail, to the address below:

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/s/ Renee Hutson
Renee Hutson

August 8, 2002
Barnwell, South Carolina

The South Carolina Court of Appeals

Hattie Rose Elam, Respondent,

v.

South Carolina Department of Transportation, Appellant.

The Honorable Daniel E. Martin, Sr.
Allendale County
Trial Court Case No. 1999-CP-03-008

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

/s/ C. Tolbert Goolsby , J.
/s/ William L. Howard , J.
/s/ M. Duane Shuler , J.

Columbia, South Carolina

September 18, 2002

FILED

9/20/02 dlp

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Daniel E. Martin, Sr., Circuit Court Judge

Case No. 99-CP-03-008

Hattie Rose Elam, Respondent,

v.

South Carolina Department of Transportation, Petitioner

PETITION FOR A WRIT OF CERTIORARI

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INDEX

Certificate of Counsel 1

Questions Presented 1

Statement of the Case 1

Arguments:

1. Did the Court of Appeals err in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when that motion followed an oral denial of petitioner's JNOV motion which could have been based on either of two independent grounds, and well established precedent required the filing of a [R]ule 59(e) motion so that the trial court rule on each ground to preserve each for appeal? ... 4

2. Did the Court of Appeals err in extending the principle of *Quality Trailer Products* to Petitioner SCDOT's Rule 59(e) motion by finding that motion repeated arguments made in the JNOV motion, when such arguments must be repeated if an appellant desires to preserve an argument previously made but not ruled upon? 8

3. Did the Court of Appeals err when, contrary to well established precedent that implicit rulings do not preserve error, the Court of Appeals held that the trial court's oral denial of Petitioner SCDOT's JNOV motion preserved all of petitioner's arguments on notice, when the denial was an implicit ruling because it could have rested on either of two independent grounds and the expressed rationale for the denial was internally inconsistent with the charge to the jury? 9

4. Did the Court of Appeals err in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when the trial court, in denying SCDOT's JNOV motion, apparently reversed its view of the law on

which it instructed the jury and for the first time ruled that pre-repair notice was sufficient, thereby making the Rule 59(e) motion the first opportunity to challenge this new ruling? 11

5. Did the Court of Appeals err in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when the motion complied with the precedent at the time it was filed, the trial court and opposing counsel treated the motion as proper and it served the purpose established in case law because the trial court provided a ruling on each point and preserved each argument for appeal? 12

6. Did the [C]ourt of Appeals err by so expanding the holding of *Quality Trailer Products* and its interpretation of the use of Rule 59(e) for error preservation, that lawyers and parties are now uncertain when Rule 59(e) motions are required to preserve error and when such motions may be held successive and not toll the time for appeal? 13

Conclusion 15

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 18, 2002.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal

when that motion followed an oral denial of petitioner's JNOV motion which could have been based on either of two independent grounds, and well established precedent required the filing of a Rule 59(e) motion so that the trial court rule on each ground to preserve each for appeal?

2. Did the Court of Appeals err in extending the principle of *Quality Trailer Products* to Petitioner SCDOT's Rule 59(e) motion by finding that motion repeated arguments made in the JNOV motion, when such arguments must be repeated if an appellant desires to preserve an argument previously made but not ruled upon?

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4. Did the Court of Appeals err in holding that Petitioner SCDOT's Rule 59(e) motion ~~did not~~ toll the time for appeal when the trial court, in denying SCDOT's JNOV motion, apparently reversed its view of the law on which it instructed the jury and for the first time ruled that pre-repair notice was sufficient, thereby making the Rule 59(e) motion the first opportunity to challenge this new ruling?

5. Did the Court of Appeals err in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when the motion complied with the precedent at the time it was filed, the trial court and opposing counsel treated the motion as proper and it served the purpose established

in case law because the trial court provided a ruling on each point and preserved each argument for appeal?

6. Did the Court of Appeals err by so expanding the holding of *Quality Trailer Products* and its interpretation of the use of Rule 59(e) for error preservation, that lawyers and parties are now uncertain when Rule 59(e) motions are required to preserve error and when such motions may be held successive and not toll the time for appeal?

STATEMENT OF THE CASE

This personal injury lawsuit was commenced by the service of Respondent, Hattie Rose Elam's Summons and Complaint, which were filed on January 19, 1999, seeking actual damages for personal injury and property damage sustained in a one-car collision on Highway 125 in Allendale County on Sunday March 8, 1998. Petitioner, South Carolina Department of Transportation (SCDOT) answered on February 18, 1999, invoking Tort Claims Act immunities for temporary or natural conditions due to weather, Elam's sole negligence and comparative negligence. Elam filed an amended Complaint, to include allegations of scarring, on July 30, 1999. SCDOT answered on August 10, 1999. Elam later filed a second amended complaint to add property damage for her vehicle on September 29, 2000: Prior to trial, SCDOT sought to amend its answer, so as to assert the Tort Claims Act immunity for design, which was denied.

The case was tried before a jury, which rendered a verdict on January 10, 2001, for Elam in the amount of two hundred fifty thousand ($250,000.00) dollars. SCDOT moved for directed verdict at the close of Elam's case and again at the close of all the evidence. At the conclusion of

trial, SCDOT moved before the trial court for a judgment notwithstanding the verdict, and for a new trial absolute and in the alternative, for a new trial *nisi remittitur*. All motions were denied, and SCDOT timely moved for reconsideration under Rule 59(e), which was also denied by the trial court's order of April 6, 2001. SCDOT's Notice of Appeal was served on counsel for Elam on April 28, 2001, and filed May 2, 2001. At the request of the Court of Appeals, counsel for both parties briefed the question of whether or not this appeal was untimely, in light of this Court's decision in *Quality Trailer Products*, 349 S.C. 216, 562 S.E.2d 615 (2002). On July 25, 2002, the Court of Appeals issued its Order dismissing the appeal as untimely. On August 8, 2002, Petitioner filed its Petition for Rehearing, which was denied by order of the Court of Appeals on September 18, 2002.

ARGUMENT

1. The Court of Appeals erred in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal because that motion followed an oral denial of petitioner's JNOV motion which could have been based on either of two independent grounds, and well established precedent required the filing of a Rule 59(e) motion so that the trial court rule on each ground to preserve each for appeal.

This Court and the Court of Appeals require that, in order for a losing party in the trial court to present an argument on appeal, the appellant must preserve the issue by first presenting it to the trial court and have the trial court rule upon all grounds that it wishes preserved for appeal. "The losing party must first try to convince the

lower court it . . . has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred". *I'On L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724-725 (2000). A specific ruling on each ground is required. "An issue is not preserved for appellate review where the trial court did not explicitly rule on the appellant's argument and the appellant made no Rule 59(e) motion to alter of amend the judgment". *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991).

Implicit rulings are ineffective for error preservation purposes. In *Walker v. The Bluffs Apartments*, 324 S.C. 350, 477 S.E.2d 472 (Ct. App. 1996), the appellant (who had not made a Rule 59(e) motion), sought, on appeal, to argue the common knowledge exception in connection with expert testimony. Concluding that the issue had not been preserved, despite having been presented by argument to the trial court, the Court of Appeals said: "The record shows that Walker argued the common knowledge exception in opposition to Narmour's motion for summary judgment. The trial court ruled that Walker's expert was not qualified, but did not explicitly rule on Walker's argument for application of the common knowledge exception." *Walker v. The Bluffs Apartments*, at 474. This reasoning is directly applicable in the case at bar. SCDOT argued both the existence of evidence of notice and the legal standard for notice, but the trial court's denial gave no indication of which argument drove his decision.

In *Van Blarcum v. City of North Myrtle Beach*, the appellant (who had not made a Rule 59(e) motion), asserted that the Master had implicitly addressed the particular question which was on appeal. This Court rejected the appellant's argument, noting that "an implicit

ruling will not suffice". *Van Blarcum v. City of North Myrtle Beach*, at 490.

Whenever an order presents these problems the courts have specifically directed appellants to file a Rule 59 motion to provide the trial court an opportunity to rule upon and issue and correct the error.

In the case at bar, at the conclusion of trial, counsel for SCDOT moved for JNOV, asserting a lack of evidence of notice to SCDOT, and citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997) for its reasoning on "interrupted notice". Elam's counsel responded that there was notice on the part of the Department, (R. p. 426, l. 16 – p. 427, l. 8), after which the trial court referred to the testimony of Sergeant King, and his having reported the condition of the road to SCDOT, and ruled: "The Court is of the opinion that the Department and the State has been placed on notice. And the question as to whether or not the defendant was negligent under these circumstances was a matter to be determined by the Constitutionally empaneled triers of the facts, the jury. The jury had made that determination. Your motion is respectfully denied." (R. p. 427, l. 16-24).

Counsel for SCDOT persisted in its efforts to focus on the question of "interrupted notice", asserting that "there's no evidence in the record of any notice or any indication of a problem, or that the repairs were inadequate, subsequent to, that is, after the time that the Highway Department completed its work on February 10th and prior to the events of March 8th, 1998". (R. p. 428, l. 8-14). Elam's counsel responded that "[t]he evidence shows that, under their own witness, Mr. Jones, he testified that when he was out there, that they had a continuing problem from

December. January, and February". (R. p. 429, l. 2-5). The trial court ruled simply "[y]our motion is denied and still stands." (R. p. 429, l. 15-16). The court gave no basis or reasoning for the denial following argument on the issues of "interrupted notice".

Thus, the trial judge could have based his ruling on either of two reasons: First, the trial judge's oral ruling denying the motion for JNOV could mean that, as a matter of law, the remedial measures performed on February 10, 1998 did not break the chain of notice which existed prior to repairs, thereby rejecting the *Summer v. Carpenter* interrupted notice. If this was the court's ruling, which is implied by its reliance on Trooper King's testimony of pre-repair notice only, then its decision was inconsistent with its charge on interrupted notice and was a significant change in its view of the law of the case, because the court was now holding that any notice, before or after the repairs, was sufficient. This ruling would be a new issue, raised for the first time in the trial court's denial of the JNOV motion, and at odds with the court's instruction to the jury, and in and of itself, justify a Rule 59(e) motion to elicit the basis of the ruling and to preserve the issue for appeal.

Second, the trial judge's order could be interpreted to be ruling that even under the theory of interrupted notice of *Summer v. Carpenter*, charged by the court, there was evidence in the record to support a finding that DOT has post-repair notice of the condition after February 10, 1998. If this was the court's ruling, and the court relied only on Trooper King's testimony about conditions before the repairs cited during his oral ruling, then the ruling was not supported by Trooper King's testimony, and in the view of SCDOT, any other evidence in the record.

The transcript of the courts ruling on the post-trial motions may reasonably be read as saying that the evidence was sufficient to support the verdict. This would not resolve SCDOT's concern or provide a specific ruling on each branch of the notice issue, the need for which was manifested by the trial court's confusing denial. The proper resolution of the sufficiency of the evidence question on JNOV, a fact question, depended upon the applicable legal standard for notice, and whether the legal standard was satisfied by pre-repair notice, as provided by Trooper King, or post-repair notice as charged to the jury under *Summer v. Carpenter*. A motion under Rule 59(e) was SCDOT's first opportunity to challenge the trial court's notice ruling.

It is undeniable that the trial court "ruled" on SCDOT's JNOV motion but, there is no way to discern from the trial transcript which of these two equally plausible rationales underlie the "ruling". At best, the denial is ambiguous; more appropriately, it is internally inconsistent. "When an order is internally inconsistent, that inconsistency must be raised to the trial court by way of post-trial motion before it is preserved for appellate review. *Parker v. Shecut*, 340 S.C. 460, 531 S.E.2d. 546 (Ct. App., 2000), *reversed on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002).

SCDOT desired to preserve both the legal and factual issues for appeal. If it had not filed the Rule 59 motion it would not have been able to challenge the court's shift in legal rationale because there was no specific ruling that the trial court had rejected the *Summer v. Carpenter* standard. Likewise, SCDOT also desired to preserve the factual argument that under the *Summer v. Carpenter* standard, there was no evidence of post-repair notice.

Under caselaw which existed at the time of trial, the only way for SCDOT to be able to appeal from the trial court was to first preserve the issues by making a motion under Rule 59(e).

2. The Court of Appeals erred in extending the principle of Quality Trailers to Petitioner SCDOT's Rule 59(e) motion on the ground that motion repeated arguments made in the [JNOV] motion when such arguments must be repeated if appellant desires to preserve an argument previously made but not ruled upon.

SCDOT does not challenge the central holding of *Quality Trailer Products, Inc. v. CSL Equipment, Co.*, 349 S.C. 216, 562 S.E.2d 615 (2002) – that a duplicative and successive motion that does not toll the time for appeal. Petitioner maintains that the Court of Appeals improperly applied that principle in the present case. In its order dismissing the appeal, the Court of Appeals described the holding of *Quality Trailer Products*:

> [W]here the appellant's Rule 59(e) motion merely reiterated, with a few procedural alterations, the grounds previously raised and ruled upon in its prior motion for JNOV and new trial, its Rule 59(e) motion amounted to a successive motion JNOV and new trial and did not toll the time for serving the notice of appeal.

(Order, p. 2).

The Court of Appeals ruled that SCOT's [sic] 59(e) motion was not entitled to tolling, noting that it "mirrored all of the grounds raised at trial in its motions for JNOV and new trial" (Order, p. 2); that SCDOT "concedes its Rule 59(e) motion reiterated the issues previously argued

in its post-trial motions for JNOV and new trial" (Order, p. 2); and that SCDOT acknowledges "it was clear the judge denied the motion for JNOV" (Order, p. 3).

The Court of Appeals erred in applying *Quality Trailer Products* to this case for two reasons. First, the court's reliance on the similarity of arguments in the JNOV motion and the Rule 59 motion is not a true indicator of whether a motion is successive. In fact, a proper motion to preserve an argument presented but not ruled upon must necessarily repeat the arguments previously made because new arguments cannot be made for the first time in a post trial motion. Moreover, the purpose of the Rule 59 motion is to provide an opportunity for the court to correct its error, and hence it was necessary to repeat the arguments. The proper focus for determining whether a motion is properly made for error preservation purposes is not whether the same arguments are made, but whether the order of the court sufficiently ruled upon each of the arguments presented. See, *Noisette v. Ismail*, *Van Blarcum v. City of North Myrtle Beach*, and *Walker v. The Bluffs Apartments*.

3. The Court of Appeals erred when, contrary to well established precedent that implicit rulings do not preserve error, the Court of Appeals held that the trial court's oral denial of Petitioner SCDOT's JNOV motion preserved all of petitioner's arguments on notice when the denial was an implicit ruling on each ground because the denial could have rested on either of two independent grounds and the expressed rationale for the denial was internally inconsistent with the charge to the jury.

The Court of [A]ppeals also erred in holding that the trial court had clearly ruled on all of SCDOT's arguments

by virtue of the trial court having denied its JNOV motion. There is no dispute that the court did not grant the JNOV motion. However, the critical question is whether that denial was a specific ruling on each argument made because the issue on appeal would be whether all arguments were preserved, not whether the verdict had been reversed. See, *Noisette v. Ismail, Van Blarcum v. City of North Myrtle Beach*, and *Walker v. The Bluffs Apartments*. As discussed above, the denial of the JNOV can be sustained on either (a) that *Summer v. Carpenter* is a correct statement of the law and that evidence of post-repair notice was provided or (b) that *Summer v. Carpenter* is not a correct statement of the law and any notice was sufficient.

Petitioner maintains that the ambiguity or inconsistency was sufficient to require a Rule 59 motion to obtain a specific ruling on the issue as required by long standing precedent. The Court of Appeals however seems to hold that the denial, as an implied ruling on each issue, was sufficient, citing *Bailey v. Segars*, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001). To the extent that the Court of Appeal[s] holds that an implicit ruling is sufficient, that holding is inconsistent with many other holdings of this Court that implicit rulings do not preserve arguments for appeal. See, *Noisette v. Ismail, Van Blarcurm v. City of North Myrtle Beach*, and *Walker v. The Bluffs Apartments*. At the very least this holding generates confusion and uncertainty in the law of post trial motions and error preservation and exposes counsel to the dilemma of whether to make a Rule 59(e) motion for error preservation and risk an untimely appeal, or refrain from filing the motion at the risk of the appellate court concluding that the argument or error was not preserved.

4. The Court of Appeals erred in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when the trial court, in denying SCDOT's JNOV motion, apparently reversed its view of the law on which it instructed the jury and for the first time ruled that pre-repair notice was sufficient, thereby making the Rule 59(e) motion the first opportunity to challenge this new ruling.

The Court of Appeals held in *Coward Hund Const. Co. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), that a Rule 59(e) motion is proper if it challenges something that was altered by the previous motion. Here, the trial court had instructed the jury on interrupted notice as provided in *Summer v. Carpenter*. (R. p. 417). The Rule 59(e) motion was directly challenging the trial court's denial of the JNOV. While the trial court's ruling on the JNOV motion did not expressly reject *Summer v Carpenter*, its ruling on the question was ambiguous because of the evidence relied upon by the court in denying JNOV and the trial court was apparently rejecting the law which it had charged[.]

SCDOT's argument on *Summer v. Carpenter* in the JNOV motion had not sought a ruling on that point because at that time of the JNOV motion the court had accepted it as the correct statement of the law on notice because it had charged the jury to that effect. That case was cited to lay the legal foundation for the argument that there was no evidence of post-repair notice. However, when the trial court denied the JNOV motion citing only pre-repair notice the court, *for the first time*, was apparently rejecting SCDOT's legal position on notice. At this point a Rule 59 motion was necessary to now argue that *Summer v. Carpenter* was the correct statement of the law, and to provide the trial court the opportunity of correcting

its error made in denying the JNOV and to rule consistently with its prior charge to the jury there must be post-repair evidence of notice.

5. The Court of Appeals erred in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when the motion complied with the precedent at the time it was filed, the trial court and opposing counsel treated the motion as proper and it served the purpose established in case law because the trial court then provided a ruling on each point and preserved each argument for appeal.

Finally, the Court of Appeals faults SCDOT's Rule 59(e) motion because it "nowhere asserts or alleges the trial court failed to rule on any of the previously-raised grounds;" citing *Quality Trailer Products*. SCDOT filed its [R]ule 59(e) motion on January 19, 2001, some 14 months before *Quality Trailer Products* was decided. Consequently the Court of Appeals was applying a standard that SCDOT could not reasonably have known at the time it made its motion, resulting in a fundamentally unfair result. Moreover, page 1 of the Rule 59(e) motion specifically points to the trial court's misapplication of the legal standard for notice in ruling on the JNOV motion so that the court and counsel were well aware of the issues to be ruled upon.

The most revealing evidence that SCDOT's Rule 59(e) motion was proper and appropriate, when made in January 2001, is the response of the trial court and opposing counsel. The trial court received memoranda and heard oral argument and then issued a detailed ruling. That Order discussed the testimony and evidence of pre-repair notice over 3½ pages and concluded that, "given the

aforementioned testimony . . . the Court is of the opinion that there was evidence, direct and circumstantial, justifying submission of the case to the jury". (R. p. 011). (Emphasis added).

Then, even though he had charged "interrupted notice" of *Summer v. Carpenter*, the trial judge referred to SCDOT's 59(e) argument on interruption of notice and stated, "[T]his Court notes that the language in that case to which Defendant refers is dictum and does not represent the applicable law in this State". (R. p. 011). Thus, only when the trial judge denied the Rule 59(e) motion did he finally and clearly rule that he did not accept the validity of *Summer v. Carpenter's* "interruption of notice."

Thus, unlike *Quality Trailer Products*, where the trial court immediately recognized the motion as duplicative, the court properly treated it as raising unresolved issues and specifically ruled on those presented. Opposing counsel never objected to the Rule 59(e) motion as successive. The issue was raised *sua sponte* by the Court of Appeals after the case had been pending there for more than 13 months, and only after *Quality Trailer Products* had been decided.

6. The Court of Appeals erred by so expanding the holding of *Quality Trailer Products* and its interpretation of the use of Rule 59(e) for error preservation that lawyers and parties are now uncertain when Rule 59(e) motions are required to preserve error and when such motions may be held successive and not toll the time for noticing an appeal.

Through *Quality Trailer Products*, this Court for the first time, imposed the penalty of not allowing the benefit

of tolling of the time for filing notice of appeal, based upon the appellant's 59(e) motion raising issues already raised to and ruled upon by the trial judge. Since issuance of that ruling, the Court of Appeals' efforts to apply the holding in at least two cases have brought a dramatic and troublesome change to post-trial practice in South Carolina.

Prior to *Quality Trailer Products*, the trial lawyer who failed to make a motion to reconsider under Rule 59(e) risked dismissal of his appeal for failure to satisfy the requirement that the matter first be raised to and ruled upon by the trial court. To this risk of dismissal for failure to make a 59(e) motion, there is now added the risk of dismissal for making a 59(e) motion which the Court determines is a successive reiteration of JNOV or new trial motions. Unfortunately, the basis for making this choice is rarely clear and knowable in advance to the lawyer who must make the decision.

As in the case at bar, it is not always easy, nor possible, to determine whether or not the trial court's ruling on an issue presented in JNOV or new trial motions is a sufficient ruling for the issue preservation requirement of "raised to and ruled upon". The determination is further confounded where, as in this case, the trial court's ruling on JNOV is internally inconsistent with the court's own prior ruling in the case, presenting the issue to the lawyer for the first time in the JNOV ruling. The determination is certainly not so simple as observing that the trial court has denied a motion.

The Court of Appeals' application of *Quality Trailer Products* has extended that holding so that the need for discerning which issues have been explicitly ruled upon

and which issues have not, poses a nearly impossible conundrum for trial lawyers.

CONCLUSION

Wherefore, based upon all the foregoing reasons, Petitioner prays that this Court issue its Writ of Certiorari to the South Carolina Court of Appeals, to consider the questions presented, and to reverse the decision of the Court of Appeals.

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October 18, 2002
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Daniel E. Martin, Sr., Circuit Court Judge

Case No. 99-CP-03-008

Hattie Rose Elam, Respondent,

v.

South Carolina Department of
Transportation, Petitioner,

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on Hattie Rose Elam by depositing a copy of it in the United States Mail, postage prepaid, on October 18, 2002, addressed to her attorney of record, H. Woodrow Gooding, Jr. and Mark B. Tinsley, Esquires, PO Box 1000, Allendale, South Carolina 29810.

/s/ Pete Kulmala
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THE STATE OF SOUTH CAROLINA
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APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Daniel E. Martin, Sr., Circuit Court Judge

Case No: 99-CP-03-008

Hattie Rose Elam, ... Respondent,

v.

South Carolina Department
of Transportation, ... Petitioner.

RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

This Court should deny the South Carolina's Department of Transportation's ("SCDOT") Petition on all questions presented because the Court of Appeals properly dismissed its appeal in this action pursuant to the holding of *Quality Trailer Products v. CSL Equipment Co.*, 349 S.C. 216, 562 S.E.2d 615 (2002).

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STATEMENT OF THE CASE

On March 8, 1998, Hattie Rose Elam was injured when she lost control of her vehicle and struck a utility pole while traveling on South Carolina Highway 125 in Allendale County. Elam brought this action against the South Carolina Department of Transportation under the South Carolina Tort Claims Act, S.C. Code Ann. §§15-78-10 to 200 (Supp. 2001). She alleged her accident was caused by excessive water on the highway and SCDOT was grossly negligent in failing to properly maintain the road.

At the close of Elam's case in chief SCDOT argued in its motion for a directed verdict, among other things, that it had made repairs to the road in February 1998 and was not thereafter put on notice of any continuing problems before Elam's wreck occurred. Citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997), SCDOT contended a governmental entity must be on notice that the problem is continuing for liability to be imposed after remedial measures have been taken, referring to this as the concept of "interrupted notice." SCDOT maintained the trial court should grant its motion for a directed verdict on the ground that Elam had failed to establish notice of the problem with the roadway in light of the remedial actions

taken by SCDOT just prior to Elam's wreck pursuant to its theory of "interrupted notice." (R.p. 254, 1.7 – p. 255, 1.6).

The trial court denied SCDOT's request for a directed verdict and submitted the case to the jury, stating "the question as to whether or not there was or was not any signs or remedial action taken is the question that should be determined by the jury and because of that fact, motion is denied." (R.p. 256, lines 1-4).

Again at the close of SCDOT's case, SCDOT renewed its motion for a directed verdict on the same basis. (R.p. 329, line 7-p. 331, line 3). This time SCDOT was more elaborate in its argument citing both the "standard" of *Summer v. Carpenter* and an [sic] purported lack of evidence of notice. SCDOT's counsel argued: "There is nothing whatsoever in the record [that] suggests SCDOT was on notice of any deficiency in repairs until the accident of March 8. There is no notice under *Summer v. Carpenter* they are relieved of the duties to respond, having performed remedial services and having no reason to believe the remedial services were deficient in that time frame." (R.p. 330, lines 4-10). Again, the trial court rejected SCDOT's contention and denied the motion. The trial court concluded that, "based on the information supplied to the court, the court is of the opinion that all of the questions posed are questions that should be determined by the triers of fact, that is the jury, and because of that fact I'm gonna respectfully [deny]." (R.p. 335, line 23 – p. 336, line 2).

On January 10, 2001, immediately after the jury returned a verdict for Elam of $250,000.00, SCDOT made motions for a JNOV and a new trial. As to the motion for JNOV, SCDOT argued in relevant part that there was no

evidence of notice according to the concept of interrupted notice in *Summer v. Carpenter*. (R.D. 424, 1.16-20).

The trial court stated it was of the opinion SCDOT had notice of the problem with the road. (R.D. 427, line 16). The court explicitly denied the motion for JNOV on this basis stating:

> "[T]he question as to whether or not the defendant was negligent under these circumstances was a matter to be determined by the Constitutionally empaneled tiers [sic] of facts, the jury. The jury has] mad that determination. Your motion is respectfully denied."

(R.p. 427, lines 17-24). SCDOT continued, arguing that:

> [T]he context in which [the] testimony [the trial court cited as supporting its decision to deny SCDOT's JNOV. motion] was presented related to notice prior to December 1997 circumstances.
>
> And what I point out is that there's no evidence in the record of any notice or any indication of a problem, or that the repairs were inadequate. Subsequent to, that is, after the time that [SCDOT] completed its work on February 10th and prior to the events of March 8th, 1998, and, therefore, [SCDOT] would be entitled to JNOV.

(R.d. 428, lines 4-15). After further colloquy, the court stated: "Your motion is denied and still stands." (R.d. 429, lines 15-16). The court also denied the motion for a new trial.

SCDOT thereafter filed a motion under Rule 59(e), SCRCP, that mirrored all of the grounds raised at trial in its motions for JNOV and new trial. In pertinent part,

SCDOT specifically moved for an order reconsidering on the ground that:

> In denying SCDOT's Motion for Judgment notwithstanding the verdict, the court apparently misapplied the appropriate standard for notice, where the evidence indicates that, in response to notice, the Defendant undertakes measures to correct the problem or eliminate the defect, and thereafter, receives no indication or notice of ineffectiveness of the corrective measures until the occurrence of the incident giving rise to Plaintiff's claim. According to *Summer v. Carpenter*, Opinion #24689 ([S.C.] 1997), notice of a hazard is essentially interrupted by responsive action to correct the defect, and absent notice of problems after the corrective measures, the Defendant has no duty to make further improvement or corrective measures.

SCDOT Notice of Motion and Motion to Reconsider Pursuant to Rule 59(e), p.1

The trial court denied the Rule 59(e) motion in an order dated April 6, 2001. SCDOT served its Notice of Appeal on April 21, 2001, more than thirty days after the trial court originally ruled on SCDOT's motions for JNOV and new trial in January 2001.

On July 25, 2002, the Court of Appeals dismissed SCDOT's appeal as untimely because it concluded SCDOT's Rule 59(e) motion merely reiterated, with a few procedural alterations, the grounds previously raised and ruled upon in the post-trial motion for JNOV and new trial, such that it amounted to a successive motion for JNOV and new trial and did not toll the time for serving the notice of appeal, citing, *Quality Trailer Products v.*

[*C.S.L.*] *Equipment Co.*, 349 S.C. 216, 562 S.E.2d 615 (2002). On August 8, 2002, SCDOT filed its Petition for Rehearing, which was denied by the Court of Appeals on September 18, 2002.

ARGUMENT

1. Did the Court of Appeals err in holding that SCDOT's Rule 59(e) motion did not toll the time for appeal when that motion followed an oral denial of SCDOT's JNOV motion which could have been based on either or two independent grounds?

The Court of Appeals was correct in holding that SCDOT's Rule 59(e) motion did not toll the time for appeal, because the motion merely reiterated, with a few procedural alterations, the grounds previously raised and ruled upon in its prior motion for JNOV. It is not significant the SCDOT's Rule 59(e) motion followed an oral denial of its motion for JNOV that could have been based on either of two independent grounds. Further, established precedent did not require SCDOT to file its Rule 59(e) motion to preserve either of the "two independent grounds" which had been previously raised and ruled upon by the trial court.

In *Quality Trailer Products, Inc. v.* [*C.S.L.*] *Equipment Co.*, 349 S.C. 216, 562 S.E.2d 615 (2002), this Court held that where the appellant's Rule 59(e) motion merely reiterated, with a few procedural alterations, the grounds previously raised and ruled upon in its prior motion for JNOV and new trial, its Rule 59(e) motion amounted to a successive motion for JNOV and new trial that did not toll the time for serving the notice of appeal. This Court noted, "Despite its caption [the] second motion was not a Rule

59(e), SCRCP, motion. The motion did not ask the trial court to rule on an issue presented but not ruled upon in any previous motion." *Id.* at ___, 562 S.E.2d at 617. *See also, Collins Music Co., Inc. v. IGT*, No. 2002-OR-405 (South Carolina Court of Appeals, filed September 4, 2002) (dismissing IGT's appeal as untimely pursuant to *Quality Trailer Products* and *Coward Hund* where IGT filed a Rule 59(e) motion, after its post-trial motions were denied, seeking an order altering or amending the post-trial order to more specifically address each separate ground raised in the post-trial motions).

Similarly in this case, SCDOT's Rule 59(e) motion did not ask the trial court to rule on an issue presented but not ruled upon in any previous motion. In fact, as SCDOT conceded to the Court of Appeals, its Rule 59(e) motion reiterated the issues previously argued in its post-trial motions for JNOV and new trial. SCDOT asserts, however, the trial court never "explicitly" ruled on the "notice" issues in regard to its JNOV motion. SCDOT contends the time for appeal was stayed while it attempted to satisfy what it perceived as a requirement of *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991), to obtain specific findings.

The trial court in this case, however, was not required to provide a detailed analysis respecting each ground offered in support of SCDOT's motion for JNOV. As the Court of Appeals pointed out in its Order dismissing this appeal, the requirement of *Noisette* is not applicable to the situation in this case. In *Noisette*, this Court, citing Rule 52(a), SCRCP, held that where the circuit court did not explicitly rule in a declaratory judgment on the argument that Noisette failed to prove, Ismail was a permissive user of a vehicle, it was not available for consideration on

appeal. Because *Noisette* involved a declaratory judgment, heard by the trial court alone, the trial court was required to make special findings of fact and law. *See* Rule 52(a), SCRCP ("In all actions tried upon facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon."). However, this case was tried to a jury; therefore, the provisions of [R]ule 52(a) are not applicable. *See*, Rule 52(a), SCRCP ("Findings of fact and conclusions of law are unnecessary on decisions of motions [except those made pursuant to Rule 41(b)] . . . "). *See also*, *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) ("We have . . . refused to require trial judges to explain reasons for ruling on [the request for a new trial as the thirteenth juror]."); *Bailey v. Segars*, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001) (stating a form order denying a motion for JNOV and new trial coupled with the transcript of the proceeding was sufficient to allow appellate review and a Rule 59(e) motion was not required to preserve issues for appeal), *cert. granted on other grounds*, (Jan. 10, 2002).

Moreover, the record indicates the trial court considered all of SCDOT's arguments several times and, as SCDOT acknowledges, it was clear the judge denied the motion for JNOV.[1] *See*, *Armstrong v. Union Carbide*, 308 S.C. 235, 417 S.E.2d 597 (Ct. App. 1992) (stating that while the order of the circuit court did not separately list and specifically address each of the twenty-nine exceptions

[1] In its memorandum filed with Court of Appeals on the issue of timeliness of the appeal, SCDOT acknowledges: "At the end of the day of January 10, 2001, it was clear that SCDOT's JNOV motion had been denied." Appellant's Brief on Timeliness of Appeal, p. 7.

raised, it was clear from reviewing the order that all grounds raised below were considered. Once the trial court has considered all of the relevant argument and clearly denies a motion for JNOV, the trial court's failure to detail all of the arguments that were rejected in its ruling does not make the denial of the motion any less explicit. *See, e.g., Bailey v. Segars*, 346 S.C. 359, 366, 550 S.E.2d 910, 914 (Ct. App. 2001) (finding that a Rule 59(e) motion is not necessary where post-trial motion is denied in a form order; "Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not ruled upon."). Additionally, this Court and the Court of [A]ppeals affirms or reverses rulings, orders and judgments, not reasons for or the analysis used to reach or decide the ruling, order or judgment. *See*, Rule 220(c), SCACR (allowing the Court to affirm any ruling, order, or judgment upon any ground appearing in the Record on Appeal).

Finally, as noted by the Court of Appeals, in its Rule 59(e) motion SCDOT nowhere asserts or alleges the trial court failed to rule on any of the previously-raised grounds. Rather, it admittedly lists all issues that were raised to the trial court in support of its motions for JNOV and new trial and argues the trial court erred in denying those motions. *See*, *Quality Trailer Products*, 349 S.C. at ___, 562 S.E.2d at 617 ("The motion did not ask the trial court to rule on an issue presented but not ruled upon in any previous motion."). Furthermore, in its Rule 59(e) motion SCDOT did not argue to the trial court that it was seeking relief on issues coming to light as a result of an order following the initial post-trial motion that altered or amended the judgment.

2. Did the Court of Appeals err in applying the holding of *Quality Trailer Products* to SCDOT's appeal?

Elam contends that this specific question was not raised in the initial arguments to the Court of Appeals and was not raised in SCDOT's petition for rehearing. Moreover, this issue cannot be deemed a subsidiary question fairly comprised in the questions presented to the Court of Appeals. Therefore, the issue is not preserved for review. Rule 226(d)(2), SCACR; *Darby v. Southern Ry. Co.*, 194 S.C. 421, 10 S.E.2d 465 (1940). *Graniteville Mfg. v. Renew*, 113 S.C. 171, 102 S.E. 18 (1920). *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999) (Court of Appeals did not address issue and petitioner did not raise issue in petition for rehearing. *Norton v. Opening Break of Aiken, Inc.*, 313 S.C. 508, 462 S.E.2d 861 (1995) (only those questions raised in the Court of Appeals and in a petition for rehearing shall be included in a petition for a writ of certiorari).

Nonetheless, for the reasons stated above, the Court of Appeals was correct in applying the holding of *Quality Trailer Products* to SCDOT's appeal. SCDOT's Rule 59(e) motion was merely a successive motion for JNOV that did not present any new issue upon which the trial court had not ruled. SCDOT argues that the "similarity of arguments in the JNOV motion and the Rule 59 motion is not a true indicator of whether a motion is successive." However, SCDOT fails to point out that its Rule 59 motion sought the same relief on the same grounds as it did its motion for JNOV. *See, e.g., Quality Trailer Products, Inc. v.* [*C.S.L.*] *Equipment Co.*, 349 S.C. 216, 562 S.E.2d 615 (2002); *Coward Hund Construction Co. v. Ball Corp.*, 336 S.C. 1, [518] S.E.2d 56 (Ct. App. 1999).

3. Did the Court of Appeals err in concluding the trial court's oral denial of SCDOT's motion for JNOV preserved all of its arguments on notice?

Elam contends that this specific question was not raised in the initial arguments to the Court of Appeals and was not raised in SCDOT's petition for rehearing. Moreover, this issue cannot be deemed subsidiary question fairly comprised in the questions presented to the Court of Appeals. Therefore, the issue is not preserved for review. Rule 226(d)(2), SCACR; *Darby v. Southern Ry. Co.*, 194 S.C. 421, 10 S.E.2d 465 (1940); *Graniteville Mfg. v. Renew*, 113 S.C. 171, 102 S.E. 18 (1920). *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999) (Court of Appeals did not address issue and petitioner did not raise issue in petition for rehearing. *Norton v. Opening Break of Aiken, Inc.*, 313 S.C. 508, 462 S.E.2d 861 (1995) (only those questions raised in the Court of Appeals and in petition for rehearing shall be included in a petition for a writ of certiorari).

Nonetheless, it is clear from the record that the trial court had expressly and explicitly rejected SCDOT's motion for JNOV on all bases (R.P.428, 1.4 – p. 429, 1.16). At that point, all issues regarding SCDOT's motion for JNOV were resolved by the circuit judge and were ripe for appellate review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *Hubbard v. Rowe*, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939) ("In matters of appeal, so far as it appears, all that this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower court and passed upon by that court."). In other words, if SCDOT wanted to appeal the issues at that point, it could.

Interestingly, the questions regarding the explicitness of the trial court's rulings only surfaced after the Court of Appeals asked the parties to brief the issue of timeliness of SCDOT's appeal in light of *Quality Trailer Products*. Additionally, there is no mention of any ambiguity or inconsistency in the trial court's ruling with regard to the jury charge on notice in SCOOT's [sic] Rule 59(e). SCDOT never thought there was any inconsistency in the trial court's ruling until the timeliness of its appeal was brought up.

4. Did the Court of Appeals err in holding SCDOT's Rule 59(e) motion did not toll the time for appeal even if, in denying motion for JNOV, the trial court reversed its view of the law on which it instructed the jury and for the first time, ruled that pre-repair notice was sufficient, thereby making the Rule 59(e) motion the first opportunity to challenge this new ruling?

Elam contends that this specific question was not raised in the initial arguments to the Court of Appeals and was not raised in SCDOT's petition for rehearing. Moreover, this issue cannot be deemed subsidiary question fairly comprised in the questions presented to the Court of Appeals. Therefore, the issue is not preserved the review. Rule 226(d)(2), SCACR; *Darby v. Southern Ry. Co.*, 194 S.C. 421, 10 S.E.2d 465 (1940); *Graniteville Mfg. v. Renew*, 113 S.C. 171, 102 S.E. 18 (1920). *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999) (Court of Appeals did not address issue and petitioner did not raise issue in petition for rehearing. *Norton v. Opening Break of Aiken, Inc.*, 313 S.C. 508, 462 S.E.2d 861 (1995) (only those questions raised in the Court of Appeals and in petition for rehearing shall be included in a petition for a writ of certiorari).

Nevertheless, in its Rule 59(e) motion, SCDOT never challenged any "new ruling" as a result of the trial court's denial of its motion for [J]NOV. [SCDOT's] Rule 59(e) motion is void of any reference to any inconsistency between the trial court's prior charge and its denial of [SCDOT's] motion for NOV. Instead, [SCDOT's] Rule 59(e) motion reiterates almost verbatim the same grounds set forth in its motion for NOV.

Again, the issue of *Summer v. Carpenter* setting forth the applicable standard of notice was raised to the trial court and ruled upon. (R.p. 330, line 4-10 and p. 335, line 23-p. 336, line 2, and p. 424, line 16 – p. 429, line 16). At that point the issue was preserved for appellate review. *Collins Music Co., Inc. v. IGT*, No. 2002-OR-405 (S.C. Ct. App., filed Sept. 4, 2002); *Wilder Corp v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998); *Hubbard v. Rowe*, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (1939).

5. Did the Court of Appeals err in holding SCDOT's Rule 59(e) motion did toll the time for appeal because this Court's opinion in *Quality Trailer Products* was not issued until after SCDOT's Rule 59(e) motion was filed and because the trial court and opposing counsel did not object to the motion as being improper[?]

The decision in *Quality Trailer Products* was a mere logical extension of the holding in *Coward Hund Const. Co. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), which was decided prior to SCDOT filing its Rule 59(e) motion. In both *Quality Trailer Products* and *Coward Hund*, it is the "successive" nature of the post-trial motion that is important, not the type of post-trial motion. Therefore, SCDOT should have known that its 59(e) motion would not toll the time for appeal.

Moreover, *Quality Trailer Products* did not create any new substantive rights or liability where formerly none existed. As such, there is nothing to limit the holding of *Quality Trailer Products* to prospective application only. *See, e.g., Osborne v. Adams*, 346 S.C. 4, 550 S.E.2d 319 (2001); *Steinke v. S.C.D.L.L.R.*, 336 S.C. 373, 520 S.E.2d 142 (1999); *Simmons v. South Carolina Farm Bureau Mutual Insurance Co.*, 301 S.C. 267, 391 S.E.2d 560 (1990); *Toth v. Square D. Co.*, 298 S.C. 6, 377 S.E.2d 584 (1989). Besides that, the holding of *Quality Trailer Products* obviously is not limited to prospective application because this Court dismissed the appeal in that case.

Finally, whether or not opposing counsel or the trial court objected to SCDOT's Rule 59(e) motion is not an issue. Timely service of the notice of intent to appeal is a jurisdictional requirement, and neither this Court nor opposing counsel has the authority to extend or expand the time in which the notice of intent to appeal must be served. *See, Quality Trailer Products, Inc. v.* [*C.S.L.*] *Equipment Co.*, 349 S.C. 216, 562 S.E.2d 615 (2002) citing, *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985).

6. Does the Court of Appeals application of the holding of *Quality Trailer Products* create uncertainty for lawyers and parties with respect to error preservation?

SCDOT argues that *Quality Trailer Products* creates a Hobson's choice for trial lawyers who must decide whether to file a Rule 59(e) motion and run the risk of having their appeal dismissed as untimely or risk not making the motion and having the appeal dismissed because the issue to be appealed is not preserved due to the fact that a 59(e) motion was not filed.

As explained above, and by the Court of Appeals in this case and in *Collins Music Co., Inc. v.* [*IGT*], a Rule 59(e) motion is not necessary to preserve an issue of appellate review if that issue has been raised to and ruled on by the trial court. Nonetheless, there is nothing that prevents a lawyer from filing a Rule 59(e) motion and then filing a timely appeal. If the particular issue appealed is not preserved, then upon dismissal of the appeal, the trial court could then hear the 59(e) motion. There is no "impossible conundrum."

CONCLUSION

For the reasons stated above, Elam requests that this Court deny SCDOT's Petition on all questions presented.

GOODING AND
GOODING, P.A.

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ATTORNEYS FOR
RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Daniel E. Martin, Sr., Circuit Court Judge

Case No: 99-CP-03-008

Hattie Rose Elam, ... Respondent,

v.

South Carolina Department
of Transportation, ... Petitioner.

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Petition for a Writ of Certiorari on South Carolina Department of Transportation by depositing a copy of it in the United States Mail, postage prepaid, on November 15, 2002, addressed to its attorney of record, E. Pete Kulmala, P.O. Box 705, Barnwell, SC 29812.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Daniel E. Martin, Sr., Circuit Court Judge

Case No. 99-CP-03-008

Hattie Rose Elam, Respondent,

v.

South Carolina Department
of Transportation, Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S RETURN

I. Respondent's Return Further Emphasizes the Need for The Supreme Court to Grant the Petition for Certiorari and Resolve the Significant Issues regarding Error Preservation and Post-Trial Motions.

Respondent's Return to the Petition for Certiorari merely reasserts arguments previously made and further emphasizes the need for review and clarification on error preservation and post-trial motions by its concluding argument. There, Respondent implicitly recognized that counsel are faced with determining whether an issue has been preserved by suggesting that in those situations counsel file a Rule 59(e) motion and then file a timely appeal. Respondent's suggestion necessarily means that the issue is not resolved by the trial court before the appeal is filed and inevitably leads to cases being remanded to the trial court for a ruling before returning to

the [C]ourt of Appeals, with accompanying delay, expense, and diversion of judicial resources entailed in that procedure.

It should now be evident that the simple statement from *Quality Trailer Products*, cited by the Court of Appeals, that "where the appellant's Rule 59(e) motion merely reiterated with a few procedural alterations the grounds previously raised and ruled upon in its prior motion for JNOV and new trial, its Rule 59(e) motion amounted to a successive motion for JNOV and new trial and did not toll the time for serving notice of appeal" is not susceptible of ready application without further elucidation from this Court. It is of utmost importance to litigants and counsel as well, that the holding of *Quality Trailer Products* be placed in context with the kinds of issues raised in this case, involving implicit rulings internal inconsistencies, and the apparent conflict between the need for a sufficient ruling for issue preservation versus the timeliness of filing notice of appeal.

This Court has now accepted review of another case (*Collins Music Co., Inc. v. IGT*) involving a number of the same issues as this case, with factual differences regarding the presentation of post-trial motions. Petitioner respectfully urges his Court to grant Certiorari and to consider both cases in consolidation, so that all issues raised may be reviewed comprehensively and a clarifying ruling may be issued.

II. Petitioner SCDOT Properly Presented All Arguments to the Court of Appeals.

In her return to the Petition for Certiorari, Respondent suggests that three of Petitioner SCDOT's Questions

Presented were not raised in either Petitioner's initial argument to the Court of Appeals or SCDOT's Petition for Rehearing. That suggestion is simply incorrect and without any basis.

In effect, Respondent is asserting that the applicability to this case of the Supreme Court opinion that caused the Court of Appeals to raise, *sua sponte*, the issue of the timeliness of SCDOT's appeal, and the arguments based on two important facts which distinguish this case from *Quality Trailer Products, Inc. v. CSL Equipment Co.*, 349 S.C. 216, 562 S.E.2d 615 (2002), were not presented to the Court of Appeals, either in first attempting to convince that Court not to dismiss SCDOT's appeal as untimely, or in SCDOT's Petition for Rehearing after the Court of Appeals had held the appeal untimely.

In asserting that the issues were not raised, Respondent cites only the initial part of SCDOT's Questions Presented 2 and 3 and the complete Question 4, (Respondent's Return to Petition for Certiorari pp. 9-10) as follows:

> 2. Did the Court of Appeals err in applying the holding of Quality Trailers Products to SCDOT's appeal?
>
> 3. Did the Court of Appeal[s] err in concluding the trial court's oral denial of SCDOT's motion for JNOV preserved all of its arguments on notice?
>
> 4. Did the [C]ourt of Appeals err in holding SCDOT's Rule 59(e) motion did not toll the time for appeal even if, in denying the motion for JNOV, the trial court reversed its view of the law on which it instructed the jury and for the first time, rule that pre-repair notice was sufficient, thereby making

the Rule 59(e) motion the first opportunity to challenge this new ruling?

To the extent that Respondent is challenging only the cited portions of the Questions Presented 2 and 3, it is amply clear that all of these arguments were made to the Court of Appeals. First, as summarized in Question 2, SCDOT consistently and repeatedly argued before the Court of Appeals that *Quality Trailer Products* did not apply to the facts presented here. (Appellant's Brief on Timeliness pp. 3-7, 9-11; Petition for Rehearing 9-10). Hence, SCDOT argued that it was error for the Court of Appeals to conclude that SCDOT's motion for JNOV was a successive motion under the standard of *Quality Trailer Products*. SCDOT also argued, as stated in its question 2 that merely because the same issue was be [sic] raised in both motions should not be determinative in applying the sanction of *Quality Trailer Products*. (Petition for Rehearing p. 11).

Second, as summarized in Question 3, SCDOT also argued that the written Rule 59(e) motion was made necessary because the trial judge's oral denial of the post-trial motions did not provide a specific ruling on each of its contentions on the issue of notice: that *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997), was a correct statement of the law, and that under that standard, there was no evidence of post repair notice of the condition to SCDOT. Also, the trial court's recitation of only pre-repair notice revealed an internal inconsistency, since the court had previously instructed the jury on interrupted notice. Hence, SCDOT argued that the trial court's oral ruling was at best an implicit ruling and did not preserve both arguments on notice. (Brief on Timeliness pp 7-9; Petition for Rehearing pp 2-6). Appellant specifically argued, as

stated in Question 3 that the trial court's oral ruling was an implicit ruling on the notice issues. (Petition for Rehearing pp. 2-7 and 6-7).

Third, as stated in Question 4, SCDOT argued that the trial court shifted the legal basis for its ruling in denying the oral post-trial motions. Originally the trial judge charged the jury on interrupted notice. However, it orally denied the post-trial motions on the grounds that there was adequate notice and in support of its conclusion, cited only the testimony of one witness who testified only to pre-repair conditions, thereby creating ambiguity in its ruling and raising for the first time, the issue of internal inconsistency in its decision. (Appellant's response to Respondent's Return to Petition for Rehearing pp. 2-3), (Petition for Rehearing pp 3-7).

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Petition, Petitioner respectfully requests this Court grant Certiorari to review the decision of the Court of Appeals.

/s/ Pete Kulmala
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November 22, 2002
Barnwell, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Daniel E. Martin, Sr., Circuit Court Judge

Case No. 99-CP-03-008

Hattie Rose Elam, Respondent,

v.

South Carolina Department
of Transportation, Petitioner.

PROOF OF SERVICE

I certify that I have served the Petitioner's Reply to Respondent's Return on Hattie Rose Elam by depositing a copy of it in the United Sates Mail, postage prepaid, on November 22, 2002, addressed to her attorney of record, H. Woodrow Gooding, Jr. and Mark B. Tinsley, Esquires, PO Box 1000, Allendale, South Carolina 29810.

/s/ Pete Kulmala
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Attorneys for Petitioner, SCDOT

November 22, 2002

The Supreme Court of South Carolina

Hattie Rose Elam, Respondent,

v.

South Carolina Department of Transportation, Petitioner.

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' order dismissing petitioner's appeal as untimely pursuant to *Quality Trailer Products v. CSL Equipment Company,* 349 S.C. 216, 562 S.E.2d 615 (2002). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 226(i), SCACR.

/s/ Jean Hoefer Toal C.J.
/s/ James E. Moore J.
/s/ John H. Waller, Jr. J.
/s/ E.C. Burnett III J.
/s/ Costa M. Pleicones J.

Columbia, South Carolina

February 24, 2003

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	) FIFTEENTH JUDICIAL CIRCUIT
	) Civil Action Number: 94-CP-26-3266
Collins Music Co., Inc., Plaintiff,	)
vs.	) **ORDER DENYING DEFENDANT'S MOTION TO ALTER OR AMEND JUDGEMENT**
IGT a/k/a IGT-North America, Defendant.	)

This matter is before the Court on Defendant's Motion to Alter or Amend the Court's Order denying Defendant's post trial motions, dated August 19, 2001.

Defendant's Motion raises no issues that were not already considered by the Court in denying Defendant's post trial motions.

IT IS HEREBY ORDERED that Defendant's Motion to Alter or Amend Judgement be denied.

IT IS SO ORDERED.

/s/ John L. Breeden, Jr.
John L. Breeden, Jr.
Circuit Judge

Conway, SC
October 29, 2001

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

John L. Breeden, Jr., Circuit Court Judge

Case No. 94-CP-26-3266

Collins Music Co., Inc. — Respondent

v.

IGT a/k/a IGT-North America — Appellant

APPELLANT'S RETURN OPPOSING RESPONDENT'S MOTION TO DISMISS

Appellant ("IGT") hereby respectfully submits its return to this Court in opposition to Respondent's ("Collins") Motion to Dismiss Appeal.

Collins' motion is obviously prompted by the Supreme Court's recent decision in *Quality Trailer Products, Inc. v. CSL Equipment Company, Inc. and I. Corp.*, Op. No. 25435 (S.C. Sup. Ct., filed April 1, 2002), as the motion was filed and served on May 20, 2002, four days after Appellant's petition for rehearing in *Quality Trailer* was denied. For the reasons discussed below, IGT submits that Collins' motion has no merit, and IGT requests that this Court summarily deny the motion.

IGT'S SUMMARY RESPONSE

1. The trial court's order in this case failed to rule on a number of purely legal issues raised by IGT in support

of its motion for JNOV or, alternatively, a new trial, so that the issues would be preserved for appeal.

2. The trial court failed to address and rule on IGT's thirteenth juror ground for a new trial which was raised for the first time in IGT's post-trial motions[.]

3. The trial court failed to address IGT's JNOV or new trial motion on the grounds that Collins' damages were barred by public policy and failed to address IGT's motions for JNOV or new trial as to IGT's counterclaims.

4. Assuming, *arguendo*, that the one-page order ruled on each ground, the ruling did not preserve the issues for appeal.

5. Assuming, *arguendo*, that the order ruled on the purely legal issues raised by IGT's its initial post-trial motions, the trial court clearly applied the wrong legal standard in denying the motions and thus altered its ruling at trial on several of these issues.

6. The post trial motions of Appellant addressed in *Quality Trailer* are clearly different and distinguishable from the post-trial motions of IGT, and the premise of that decision is distinguishable and inapplicable here. *Quality Trailer* treated a motion that, while captioned a 59(e) motion to alter or amend, was merely a repeat of the motions for JNOV and new trial. It asked the trial court to *reconsider* its denial of all motions, reverse its ruling and grant the motions. IGT's 59(e) motion made no such request, and sought only to have the trial court alter or amend its one-page order to address the legal issues raised in IGT's JNOV and new trial motions, resolve conflict in the basis of its ruling, and, thereby, preserve those issues for this Court's review.

7. The post-trial motions in *Coward Hund Construction Co., Inc. v. Ball Corp. and Carolina Glass Contractors, Inc.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999) are even more distinguishable and less applicable. There, the court addressed a situation where the Appellant made *two* 59(e) motions, the second of which did not even involve the issues ruled on by the trial court's initial order. Here, IGT made JNOV and new trial motions followed by *one* appropriate 59(e) motion to preserve the issues for appeal.

PROCEDURAL HISTORY

Collins brought this action in November of 1994 based upon a video gaming machine distributorship agreement it had with IGT. The trial concluded on August 3, 2001 with a verdict in Collins' favor for $15,000,000. On August 13, 2001, IGT filed a motion for Judgment Notwithstanding the Verdict, New Trial, and New Trial Nisi Remittitur pursuant to Rules 50(b) and 59(a), SCRCP respectively. (Exhibit "A").

As to Collins' claims *and* as to IGT's counterclaims, IGT's 50(b) motion requested JNOV or, alternatively, a new trial, based upon erroneous legal rulings of the court raised in IGT's directed verdict motions. IGT also requested a new trial under 59(a) based upon the thirteenth juror doctrine and upon erroneous evidentiary rulings and jury charges. Alternatively, IGT moved for a new trial nisi remittitur, specifically requesting the trial court to remit the verdict to $2,099,629. IGT listed 28 specific grounds in support of its motions and addressed those grounds in a memorandum in support of the motions. (Exhibit "B"). The memorandum explained that IGT's motions separately raised both legal issues *and* sufficiency of evidence issues.

On August 29, 2001, in a one-page order, the trial court generally denied each of IGT's three motions, but made no effort to address each ground supporting the motions. (Exhibit "C"). Instead, in ruling on the new trial motion, the order stated, "as to IGT's motion for new trial under Rule 59(a), SCRCP, *all issues were properly addressed at trial.*" (emphasis added). In ruling on IGT's motion for JNOV, the order stated, "I conclude that there is sufficient evidence to sustain the jury's verdict." Finally, as to IGT's nisi remittitur motion, the order concluded that, "the damages awarded by the jury are within the range of damages shown by the evidence."

On September 13, 2001, IGT filed an appropriate 59(e) motion to alter or amend. (Exhibit "D"). The 59(e) motion requested the trial court to alter its order and to make "specific rulings, and the basis therefor [sic], as to each ground raised" in IGT's motions. The motion then specifically stated each of the grounds listed in the post-trial motions, which incorporated at least 21 grounds that the court had failed to address properly.[1] On October 29, 2001, the trial court denied IGT's 59(e) motion, holding that it *had* considered all issues. (Exhibit "E"). Thereafter, the

[1] *See* Exhibit "A", grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 20, 25, 26, 27, and 28.

While the 59(e) motion may not be as detailed and focused as it could be, it is nonetheless a Rule 59(e) motion requesting Rule 59(e) relief. Because of the absence of the explicit rulings in the trial court's order as to so many grounds, IGT's 59(e) motion included each of the grounds of the post-trial motion and incorporated its memorandum, recognizing that the trial court was not a stranger to the issues and IGT's position. The trial court was intimately familiar with the issues as they had been thoroughly raised and considered at trial and fully briefed in IGT's memorandum.

time for filing IGT's notice of appeal began to run. On November 21, 2001, IGT filed and served its notice of appeal.

RESPONSE TO COLLINS' ALLEGATIONS

In its memorandum supporting its motion to dismiss, Collins submits three arguments. First, Collins alleges that no issue was raised but not ruled on in IGT's post-trial motions; therefore, IGT's 59(e) motion was not necessary. Additionally, Collins suggests that pursuant to the recent cases *Quality Trailer* and *Coward Hund*, Rule 203(b)(1), SCACR and Rule 59(f), SCRCP do not apply to toll IGT's time for serving and filing its notice of appeal. Under the application of those cases, Collins lastly argues that IGT could not file a 59(e) motion because the one-page order did not alter or change the trial court's initial judgment. Each of Collins' arguments is addressed below.

I. IGT's 59(e) MOTION WAS APPROPRIATE UNDER SOUTH CAROLINA LAW AND TOLLED THE TIME FOR SERVING THE NOTICE OF APPEAL.

Rule 59(f), SCRCP provides that once *any* motion under Rule 59, (for new trial under 59(a) or to alter or amend under 59(e)) has been timely made, the time for appeal "shall be stayed." Additionally, Rule 203(b)(1), SCACR, provides that when a timely motion for JNOV, new trial, or to alter or amend the judgment has been made, "the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion." Aside from the ten-day time limit, these rules do not contain any condition or restriction on the tolling effect of filing a 59(e)

motion. Rather, they simply state that *serving a motion* is sufficient for tolling. Collins makes no allegation that IGT's 59(e) motion was not in compliance with the time limit, and, therefore, IGT's time for serving and filing its notice of appeal did not begin until the trial court's order of October 29, 2001.

This Court and the Supreme Court have consistently held that 59(e) motions are appropriate and necessary when the trial court **fails to rule on an issue previously raised** or when the trial court **only gives a *general* ruling that fails to preserve the issues for review**. *See Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991); *Payton v. Kearse*, 319 S.C. 188, 460 S.E.2d 233 (Ct. App. 1995); *Vespazianni v. McAlister*, 301 S.C. 411, 415 S.E.2d 427 (Ct. App. 1992). In addition, our courts have relied on the federal court's interpretation of Rule 59(e). *See Coward Hund*, [s]*upra*, at 4. Federal courts have held that 59(e) motions are appropriate when used to "**call into question the correctness of a judgment on some material point of fact or law . . .**" *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691 (10th Cir. 1982) (emphasis added).

A. <u>The trial court failed to rule on all of the issues presented.</u>

As this Court has held, "an issue either not presented to the trial court or not properly preserved by an exception presents no question before [the appellate court] on appeal". *Mackey v. Kerr-McGee Chemical Corp.*, 280 S.C. 265, 312 S.E. 2d 565 (Ct. App. 1984). *See also I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (stating that, "If the losing party has raised an issue in the lower court, but the court fails to rule upon it,

the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.")

Additionally, in *Payton v. Kearse*, [*s*]*upra* at 227, this Court held that "an issue raised but not ruled on by the trial court is not preserved and the complaining party must move to amend the judgment pursuant to Rule 59(e), SCRCP." In that case, one issue on appeal was a juror's failure to respond to a *voir dire* question. This Court would not consider the issue even though Kearse had raised it to the trial court in his post[-]trial motions, because the trial court "did not mention or rule on this issue in its order denying Kearse's post[-]trial motions, and Kearse did not request a ruling on the issue by way of a Rule 59(e) motion." *Supra*. at 228, IGT faced exactly the same situation upon receipt of the trial court's order denying its post-trial motions. As in *Payton*, the trial court did not rule on issues properly placed before it, and so a 59(e) motion was required.

1. The trial court never addressed IGT's motion for new trial under the thirteenth juror doctrine.

In its post[-]trial motion for new trial, IGT specifically requested, for the first time, a *new trial* under the thirteenth juror doctrine because the verdict was "so excessive as to indicate caprice, passion or prejudice on the part of the jury."[2] *See* Exhibit "A", grounds 25 and

[2] Additionally, IGT requested the court to nisi remit the verdict from $15,000,000 to $2,099,629 because the verdict, which Collins supported with damages allegedly under the IGT distributorship agreement, was inconsistent with Collins' position at trial that the

(Continued on following page)

26. The order did not even mention, much less rule upon, this issue.[3]

This Court has held that a ruling under the thirteenth jurors doctrine is appropriately addressed as a new trial motion. *Haselden v. Davis*, 341 S.C. 486, 534 S.E.2d 295 (Ct. App. 2000). Therefore, the trial court's ruling on IGT's new trial motion *should* have addressed the thirteenth juror issue, but did not. The court's stated reason for denying IGT's new trial motion on all grounds ("all issues were properly addressed *at trial*"), reflects clearly that the court could not *possibly* have considered or ruled on the thirteenth juror doctrine. Unlike IGT's new trial grounds based on evidentiary and jury charge errors, which were discussed and ruled upon initially at trial, the thirteenth juror motion was made *for the first time* in the new trial motion. Thus, by stating in the order that the new trial issues had properly been addressed "at trial" as the *only* reason for denying them, the order reflects that the trial court could not have ruled on, if it even considered, the thirteenth juror issue.

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distributorship agreement did not even apply to one side of his business. [50(b)-59(a) Motion, ¶ 17].

[3] See *Payton*, where the issues were not preserved because the trial court did not "mention or rule on [the] issues." *Id.*, at 227.

2. The trial court's order never addressed IGT's motion for JNOV on grounds that Collins' damages violated public policy.

At trial, IGT moved for directed verdict on grounds that an award of damages to Collins would violate public policy because Collins could not have purchased any machines from IGT without breaching a contract it had with another manufacturer. The court's only response (or ruling) to IGT's motion was to say, "All right, sir." (Tr. Trans., p. 1515).

In an attempt to obtain a ruling on the issue sufficient for this Court's review, IGT's post-trial motions requested a ruling "as a matter of law, that Collins' claimed damages were barred by public policy." *See* Exhibit "A", ground 20. In response, the trial court merely stated there was "sufficient evidence to sustain the jury's verdict." IGT could not assume that this was responsive to the public policy ground, because sufficiency of evidence for the jury is not a basis for ruling on an issue which is a matter of law for the court. Thus, IGT never received *any* ruling from the trial court on this legal issue.

3. The trial court's order never addressed IGT's motions which requested JNOV, or in the alternative, new trial on IGT's counterclaim.

In it's post-trial motions, in addition to requesting JNOV and new trial as to *Collins'* claims, IGT sought:

> [A] judgment *in favor of IGT* notwithstanding the verdict on the issues of Collins' liability to IGT on

> each of the causes of action set forth in its Counterclaims, and for a new trial only with regard to the issues of damages recoverable by IGT in each cause of action set forth in its Counterclaims, and/or . . . in the alternative, for a new trial absolute with regard to all of the causes of action set forth in IGT's Counterclaims.

(Exhibit "A", p. 1). This motion was based upon each of the 28 specific grounds in the motion [Exhibit "A"], as well as the 17 issues in the memorandum in support of the motion [Exhibit "B"]. The trial court's order never addressed these issues, or if it attempted to address them, the order was unclear as to whether the motions for new trial and JNOV it referenced referred to *Collins'* claims or to *IGT's*. Therefore, in order to adequately preserve the post-trial grounds as to IGT's counterclaims, its 59(e) motion was appropriate.

B. Even if the court's order could be interpreted as a ruling on the issues, the ruling would not preserve the issues for appeal.

The Supreme Court has clearly held that "where a trial court does not *explicitly rule* on an argument raised, *and appellant makes no Rule 59(e) motion* to obtain a ruling, the appellate court may not address the issue." *Shealy v. Aiken Co.*, 341 S.C. 448, 535 S.E.2d 438 (1991) (*citing Noisette v. Ismail*, [s]*upra*) (emphasis added). This Court has held that 59(e) motions are required where the trial judge has not explicitly ruled on an issue unless the record on appeal is sufficient to show that the issues were properly addressed. *Bailey v. Segars*, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001). In this case, if the order could

somehow be construed to have ruled on IGT's motions, it could only have been an insufficient general ruling.

In *Noisette*, the Supreme Court reversed this court's decision remanding the case to the trial court for a specific ruling on whether Ismail was a permissive user of a vehicle. The sole issue in *Noisette* was whether Ismail was a permissive user while driving an automobile owned by the named insured Owens, and, thus, an insured under the policy. The trial court's order ruled that "Ismail was an insured," and the insurer did not make a 59(e) motion for a more explicit ruling. The Supreme Court held that because the trial judge did not rule "explicitly" that Ismail was a "permissive user", and because the respondent did not make a 59(e) motion to amend or alter the judgment on this ground, the issue was *not* preserved for this Court's review. *Supra* at 59.

Similarly, in *Shealy v. Aiken Co.*, [*s*]*upra*, the issue on appeal was whether work conditions had aggravated Shealy's alcoholism. The trial judge's order stated: "Inasmuch as it does not appear that the Commission made any errors of law, and it does appear that there is substantial evidence to support its findings, the order of the South Carolina Workers' Compensation Commission is affirmed." The Supreme Court again agreed with this Court's ruling that "the issue is not preserved because the trial judge's general ruling is insufficient to preserve the specific issue for appellate review; and Shealy did not move to alter or amend the judgment pursuant to 59(e), SCRCP." *Id.* at 444.

Finally, in *Bailey v. Segars*, [*s*]*upra*, this Court addressed Bailey's claim that Segars' appellate issues were not preserved because the trial court had not explicitly ruled on them in Segars' JNOV motion, and because

Segars had not moved the court to specify its ruling under 59(e). In support of its position, Bailey cited *Vespazianni v. McAlister*, [*s*]*upra*, where this Court had dismissed an appeal for the same reason. This Court denied Bailey's motion to dismiss, but only because the record on appeal was more complete than it had been in *Vespazianni*. In *Bailey*, the record contained not only the JNOV motion and order denying it, but the trial court had also provided oral arguments on the post[-]trial motions, and a complete transcript of that hearing was included in the record. In *Vespazianni*, the record on appeal only contained the order denying the motion.

Unlike the situation in *Bailey*, IGT was **not** provided a hearing on its post-trial motions. Accordingly, due to the absence of explicit rulings and uncertainty in the trial court's order, there was *no record* from which this Court could determine whether or not the trial court had properly addressed each issue. This crucial distinction from *Bailey* made IGT's 59(e) motion appropriate.

The court's order was so general on IGT's issues that IGT found it impossible to determine whether the issues and time were preserved. *See* Exhibit "A", grounds 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12; also *see* Exhibit "B", issues 1, 2, 3, 4, and 5. The holding in *Bailey*, along with the preservation cases cited herein, dictated that IGT file a 59(e) motion.[4] Had IGT failed to take this action, Collins would undoubtedly be

[4] *See also I'On, L.L.C.*, [*s*]*upra* at 23-27, where our Supreme Court repeatedly admonishes the bar, particularly a losing party at trial, to attempt to get "the lower court to rule properly after it has considered all relevant facts, law, and arguments" and encourages the efforts of all parties to preserve the issues for appellate review.

taking the position now that IGT's failure to file a 59(e) motion resulted in IGT's issues not being properly preserved. In light of the general order and in the face of a $15,000,000 verdict resulting from *numerous* legal errors, IGT's 59(e) motion was an appropriate option to assure that all issues were preserved for appellate review.

C. Assuming the trial court *had* ruled on each issue in the order, the ruling altered the court's previous rulings at trial.

In its post-trial motions, IGT raised several issues of law which required a ruling at trial by the *court*, not the jury. Even accepting Collins' argument that these issues were addressed by the order, the *basis* upon which the order denied the motions altered the trial court's rulings at trial. Thus, a 59(e) motion was appropriate to preserve those issues for appeal.

Four brief examples demonstrate this predicament. At trial, IGT moved for directed verdict on grounds that judicial estoppel should have applied and prohibited Collins from taking factual positions directly contradictory to positions it had taken previously in this action and in previous litigation. *See* Exhibit "A", ground 14. The court denied this motion on a legal basis, ruling that judicial estoppel, as a legal principle, did not arise because Collins' previous testimony was a "legal position" instead of a factual one. (Tr. Trans. p. 97).

Also, IGT moved to bar Collins' damages claim under the doctrine of judicial admissions because Collins['] basis for damages at trial was not the basis pled in Collins' complaint or raised in discovery. Alternatively, IGT requested permission to publish Collins' pleading admissions

to the jury. See Exhibit "A", grounds 15 and 18. The court denied both motions, again on a legal basis, ruling that pleadings were not evidence for the jury to consider. (Tr. Trans. p. 1481).

Additionally, IGT moved to bar Collins' damages under collateral estoppel because Collins had pled and recovered the same damages in a previous action. *See also* Exhibit "A", ground 16. The court also denied this motion on a legal basis, holding that collateral estoppel did not apply because IGT was not a party to the previous action. (Tr. Trans. pp. 404-407).[5]

IGT's 50(b) motion asked the trial court to grant JNOV because these four issues were based on rulings of *law*, not on facts decided by the jury. Alternatively, IGT's 59(a) motion requested a new trial based upon these same grounds. In response, the order stated as to *all* of the JNOV grounds, "I conclude that there is sufficient evidence to sustain the jury's verdict." Since sufficiency of the evidence was not the basis for addressing these legal issues at trial, the order's denial on *factual* grounds effectively altered the court's at-trial rulings. Thus, IGT had no option but to make a 59(e) motion to assure preservation of these issues for appeal; otherwise, it risked this Court's ruling that these crucial and meritorious issues were not preserved for appellate review.

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[5] The trial court also granted Collins' motion to strike IGT's claim under the U.T.P.A. on a legal basis. IGT's post-trial motion addressed this situation similarly to the other three examples in this section. *See* Exhibit "A", grounds 24 and 28.

II. IGT's 59(e) MOTION IS CLEARLY DISTINGUISHABLE FROM THE MOTIONS FILED IN *QUALITY TRAILER* AND *COWARD HUND*.

Collins asserts that *Quality Trailer* and *Coward Hund* are so determinative on the dismissal issues that any assertion by IGT that its 59(e) motion tolled the time for serving "is without merit." However, as shown above, Collins' assertion that the order was adequate to preserve the issues for appeal is simply not accurate. Additionally, Collins' position that IGT filed a 59(e) motion identical, or even similar to the motions filed in either *Quality Trailer* or *Coward Hund* is without merit.

Collins cites *Coward Hund* for the propositions that "a successive motion pursuant to Rule 59 did not stay an appellant's time for filing its notice of appeal," and "a second motion for *reconsideration* is only appropriate if it challenges a finding that was altered from the original judgment . . ." (emphasis added). (Collins memorandum, p. 4-5).

By asserting that IGT's 59(e) motion did not toll the time to serve and file its notice of appeal, Collins disingenuously implies that a 59(e) motion has no tolling effect following *any motion* under Rule 59 – either 59(a) [new trial] or 59(e) [alter or amend]. What Collins ignores is that *Coward Hund* merely holds a *second 59(e)* motion, following the denial of an *initial 59(e) motion*, does not have a tolling effect.

In *Coward Hund*, this Court made perfectly clear that the Appellant had filed two successive 59(***e***) motions, not a motion for new trial under 59(a) followed by a 59(e) motion. In fact, the motions in the *Coward Hund* Record reflect that Appellant *did* file successive 59(***e***) motions

(Exhibits "F" and "G"), and this Court held that because the issue had already been "properly" addressed in the first 59(e) motion, Coward Hund's second motion was unnecessary for issue preservation. In fact, this [C]ourt noted that the second 59(e) motion did not even involve the statute of limitations issues decided by the trial court in its judgment. The motion instead requested clarification of Coward Hund's possible future indemnification claim and was more appropriately a Rule 60(b) motion. *Coward Hund*, [*s*]*upra.* at 5-6. Therefore, not only was *Coward Hund*'s second motion a successive 59(e) motion, it also was inappropriate because it did not involve an issue in the original 59(e) order.

IGT filed appropriate motions under 50(b) and 59(a), and *one* 59(e) motion seeking an alteration of the trial court's one page order. Accordingly, *Coward Hund* does not apply in this case.

Collins also attempts to broaden the reach of *Coward Hund* by inappropriately asserting that *Quality Trailer* requires this Court to dismiss IGT's appeal. However, as explained below, *Quality Trailer* is distinguishable and does not warrant dismissal of IGT's appeal.

In *Quality Trailer*, the Supreme Court found the appeal was untimely, not because the appellant ("I. Corp[.]") filed successive 59(e) motions as in *Coward Hund*, but because the second motion was identical to the initial new trial and JNOV motions. Furthermore, they did not ask the trial court to rule on an issue presented but not addressed. I. Corp[.] contended that its second motion [Exhibit "J"] was not a successive or identical new trial and JNOV motion, but was in fact a 59(e) motion. The Court held that despite its caption, the second motion was *not* an appropriate 59(e)

motion because it sought "*reversal* of the Order . . . [without] identifying a single issue raised but not ruled upon – it merely recites, *verbatim*, the arguments made in the earlier motions." *Supra* at 7-8 (emphasis added).

Collins also asserts that *Quality Trailer* applies because IGT's 59(e) motion was "a successive request to revisit the identical issues previously raised . . . and decided[.]"[6] However, Collins misinterprets not only the relief IGT sought in its 59(e) motion, but also the altering effect of the court's one-page order on its rulings at trial. I. Corp[.]'s motion in *Quality Trailer* and IGT's 59(e) motion are totally different; therefore, the holding in *Quality Trailer* is inapplicable here.

A. I. Corp[.]'s second motion sought the identical relief sought by the first motion.

In I. Corp[.]'s motion for JNOV, it asked the court to "set aside and to have judgment entered in accordance with I. Corp[.]'s motion for Directed Verdict." In a separate motion for new trial under 59(a), I. Corp[.] asked the court to grant a "new trial in accordance" with its JNOV motions. (Exhibit "H"). In response, the trial court issued a four-page order (Exhibit "I") wherein it set out, under separate headings, the background, the standard for JNOV, the standard for new trial, a discussion of the evidence and issues, and a conclusion. The order was certainly detailed and specifically address[ed] the issues raised in I. Corp[.]'s initial motion.

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[6] Collins Memorandum, p. 5.

Despite the clarity of the order, I. Corp[.] filed a second motion, captioned "Defendant I. Corp[.]'s Motion to Alter, Amend or *Reconsider* Judgment and Findings Denying Defendant's Motion for Judgment [N]otwithstanding the Verdict and Motion for New Trial" (Exhibit "J"). (emphasis added). However, in that motion, I. Corp[.] did *not even purport* to request a specific ruling on any issue not ruled upon, nor a statement of the basis for any of the rulings. Instead, I. Corp[.] sought the *identical relief* requested in its initial post-trial motion.

In his order denying I. Corp[.]'s second motion (Exhibit "K"), the trial court noted that no new issues were raised and the relief I. Corp[.] was seeking was "reversal of the [first] Order." Based upon these findings, the trial judge denied I. Corp[.]'s motion and this Court later held the motion not to have tolled the time for serving I. Corp[.]'s notice of appeal.

B. IGT's 59(e) motion was **not** a request for the trial court to reverse and reconsider its initial order, and thus is distinguishable from *Quality Trailer*.

The one-page order denying IGT's post-trial motions was certainly much less explicit than its counterpart in *Quality Trailer*. The trial court's order in *Quality Trailer* was a four-page, detailed order with specific headings to address each of the issues presented. Conversely, the order in this case was a ruling on only some of the issues presented, and as to other issues, altered the court's ruling at trial. IGT could not rely on this order as preserving all issues for appeal.

I. Corp[.]'s second motion provides:

> [I. Corp[.] requests] to have the jury verdict and judgment of $86,314.53 in favor of Plaintiff, *set*

> *aside* and to *have judgment entered* in accordance with I. Corp[.]'s Motion for Judgment Notwithstanding the Verdict and with I. Corp[.]'s Motion for Directed Verdict or in the alternative *prays for a new trial* in accordance with I. Corp[.]'s Motion for New Trial . . .

(Exhibit "J", p. 1). (emphasis added). Conversely, IGT's 59(e) motion, requesting the trial court to alter its order, provided:

> . . . the Defendant [moves] before the Court to *Alter or Amend* its Judgment pursuant to Rule 59(e) of the [SCRCP]. The Defendant requests that the Court make specific *rulings*, and the *basis therefore*, [sic] as to *each ground* raised in Defendant's Motion for Judgment Notwithstanding the Verdict, New [T]rial and New Trial Remittitur . . .

(Exhibit "C", p. 1). Clearly, IGT did not seek reversal of the trial court's order as sought by I. Corp. In support of the 59(e) motion, IGT referenced the memorandum in support of its previous motions to draw the court's attention to issues IGT had raised, but upon which the court had not yet specifically addressed. Also, IGT listed *each* of its 28 grounds for appeal, not to again seek relief based upon them, but to insure that the court had addressed *all* of them.[7]

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[7] As the positions in this return demonstrate, the trial court either failed to address, only generally addressed, or addressed in a manner which altered its previous judgment at least *21* of the 28 grounds referenced in IGT's 59(e) motion.

In denying IGT's 59(e) motion, the court held that it *had* ruled on all of IGT's grounds. However, the court did recognize that IGT's 59(e) motion sought only to insure that all issues had been ruled upon; not, as Collins implies here, to raise *new* issues or have the court reconsider old ones. In fact, the court refused to sign a draft order, prepared by Collins' attorneys, which stated that IGT "raised no *new* issues for the court to consider." [8] (emphasis added). (Exhibit "L"). Instead, the trial court issued its own order which held that the 59(e) motion "raises *no issues* that were not already considered by the court." (emphasis added). The trial court clearly disagreed with Collins' implication about the purpose of IGT's 59(e) motion, and instead recognized that the motion's purpose was simply to insure that a ruling had been obtained on all grounds sufficiently for appeal.

As even a cursory examination reveals, IGT's 59(e) motion and the trial court's order denying it are vastly different than the comparable documents in *Quality Trailer*. Unlike I. Corp[.], IGT did not request *relief* from the court in its motion. Thus, the 59(e) motion was not a second, identical JNOV or new trial motion, and, for that reason, *Quality Trailer* does not apply to this case.

Coward Hund holds only that the time for serving a notice of appeal is not tolled when a party makes a second ***59(e) motion*** that does not challenge or alter the original judgment. *Quality Trailer* holds that the time for serving

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[8] Which is, of course, inappropriate, as a cardinal rule of appellate law is that an issue cannot be first raised to the trial court in a 59(e) motion. *Eaddy v. Oliver*, 345 S.C. 39, 545 S.E.2d 830 (Ct. App. 2001).

is not tolled when a party makes a second and identical motion for **new trial or JNOV.** Neither situation exists here, and IGT's 59(e) motion was appropriately made.

CONCLUSION

Attorneys in this state have long been cautioned by our Courts that rules for appellate jurisdiction are strict and preservation of issues on appeal is *paramount* to all other procedural rules. *See Hendrix v. Eastern Distribution, Inc.*, 316 S.C. 34, 446 S.E.2d 440 (Ct. App. 1994) (stating that "[t]he rules which govern our appellate jurisdiction and determine which issues are preserved for appeal are . . . strict.") (*aff'd in result and vacated in part*, 320 S.C. 218, 454 S.E.2d 112 (1995)). *See also Kennedy v. The South Carolina Retirement System*, S.C. Sup. Ct. Order dated July 23, 2001 (Shearhouse Adv. Sh. No. 27), which stated:

> We reiterate this Court's longstanding principle of error preservation. "Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plain error rule."

(Quoting Jean H. Toal, et al., *Appellate Practice in South Carolina* 65 (1999)).

Collins' position, if accepted, would place an attorney facing a vague post[-]trial order in an untenable dilemma. If the attorney were to make a good faith 59(e) motion premised on an inadequate ruling, later determined to have been unnecessary, the respondent would move to have the appeal dismissed as untimely. On the other hand, if the attorney did *not* file the 59(e) motion, the respondent would claim that the trial court either failed to rule, or did not *explicitly* rule on the issue, and the issue was not

therefore preserved. Clearly, this "Catch-22" interpretation cannot prevail.

The cases cited by Collins as the basis for dismissing IGT's appeal are clearly not applicable to this case. This State has recognized the validity of a Rule 59(e) motion in cases where the court fails to rule on an issue, where the court is not explicit in ruling on an issue, and where the court's ruling alters its previous decision. Not one, but all three of these "appropriate" reasons for filing a 59(e) motion are present here. IGT's motion was not only appropriate, but was what any attorney in South Carolina would have done in order to adequately protect and preserve his client's interests.

For the reasons set forth above, IGT submits that its appeal was timely, this Court has jurisdiction to hear the merits of this appeal, and Collins' motion should be dismissed. Alternatively, because of the entwinement of both parties' positions on the merits, IGT requests that this Court consider Collins' motion as part of this Court's review of all issues on appeal, or grant the parties a hearing on Collins' motion to dismiss.

May 30, 2002

Respectfully submitted,

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RULE 201
RIGHT TO APPEAL

(a) Judgments and Orders Subject to Appeal. Appeal may be taken, as provided by law, from any final judgment or appealable order. The procedure for petitioning for a writ of certiorari to review final judgments in post-conviction relief cases is provided by Rule 227.

(b) Who May Appeal. Only a party aggrieved by an order, judgment, or sentence may appeal.

South Carolina Judicial Department

RULE 204
TRANSFER OF CASES

(a) Improperly Filed Cases. In the event that the notice of appeal is filed in the wrong appellate court, the appellate court in the [sic] which the matter is filed shall issue an order transferring the case to the appropriate appellate court.

(b) Certification by Supreme Court. In any case which is pending before the Court of Appeals, the Supreme Court may, in its discretion, on motion of any party to the case, on request by the Court of Appeals, or on its own motion, certify the case for review by the Supreme Court before it has been determined by the Court of Appeals. Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance. The effect of such certification shall be to transfer jurisdiction over the case to the Supreme Court for all purposes.